

(1999) 10 PAT CK 0003
In the Patna High Court
Case No : C.W.J.C. No. 3104/92 (R)

Bhagwan Singh

APPELLANT

Vs

Heavy Engineering Corporation Ltd. and Others

RESPONDENT

Date of Decision : 06-10-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226, 227
Contract Act, 1872 — Section 23
Industrial Disputes Act, 1947 — Section 2(eee)

Citation : (2000) 4 PLJR 199

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : V. Shivnath, S. Srivastava and Anita Sinha, for the Appellant; Anil Kumar Sinha and R. Mukhopadhyaya, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In this application the petitioner has prayed for issuance of an appropriate writ for quashing the office order as contained in memo no. 1198/92 dated 1.7.92 whereby the services of the petitioner has been terminated within the premises of the terms of clause 36 of the Standing Order of respondent no. 1, Heavy Engineering Corporation (shortly the Corporation) and further for a declaration that clause 36 of the Standing Order of the Establishment of the Corporation is ultravires to Articles 14 and 16 of the Constitution. A further prayer has been made for a direction to the respondents to consider the case of the petitioner or his ward for employment in the Establishment of the Corporation on i.e. ground that the petitioner has been declared as disabled person. Petitioner's case is that he was appointed as a peon under the Corporation on 21.2.62 and his date of birth is 3.4.1943. In 1964 the petitioner was promoted to the post of fireman and in 1977 he was promoted to the post of leading fireman. Lastly he was promoted to the post of supervisor, grade II in 1985. He served the establishment for about 30 years with full sincerity. His further case is that in 1989-90 he got paralysis attack due to which his left leg

was slightly affected and he was admitted to the hospital. After recovery from ailment and discharge from the hospital, the petitioner was granted earned leave for the said period. He joined his duty on 1.5.89. Petitioner's further case is that pursuant to a demand raised by the Hatia Workers Union, the management represented by the Chairman-cum-Managing Director, entered into a tripartite settlement on 27.9.89 wherein it was decided that if a medically unfit employee has completed at least 15 years of service and is left with a minimum three years of service before superannuation, he or she can opt voluntary retirement from the Corporation subject to employment of dependant son. It was further decided that the management shall consider such request provided a duly constituted medical Board certifies the employee to be unfit for any suitable job in the Corporation. It is stated that the respondent-Corporation vide circular No. 10/89 has taken a similar decision to give employment to medically unfit workman. Petitioner's further case is that after recovery from illness he was assigned a job of blowing siren and maintenance work of the establishment. It is stated that before making an application for his option for voluntary retirement, the petitioner was directed to appear before the Medical Board for examination and pursuant thereto he appeared before the Medical Board and was found unfit to continue in the service. Consequently, by office order No. 37775 dated 1st July, 1992 the services of the petitioner was terminated in terms of clause 36 of the Standing Order and by office order dated 20th July, 1990 the petitioner has been relieved from service. The petitioner, thereafter, made representation to the Chairman-cum-Managing Director to consider his case for reinstatement and also for giving employment to one of his dependants but the same has not been considered. It is, therefore, contended that the termination of the petitioner's service under clause 36 of the Standing Order is illegal, arbitrary and ultra vires to the Constitution and is opposed to the Public Policy.

2. A counter affidavit has been filed by the respondents denying and disputing the averments made in the writ petition. The case of the respondents is that the petitioner suffered from paralysis and was admitted to hospital. He was in commuted leave on medical ground from 22.4.89 to 28.4.89 and he joined his duty on 1.5.89. The petitioner was thereafter, directed to appear before the Medical Board and was found unfit for any job. Further case of the respondents is that the service of the petitioner was terminated under clause 31 of the Standing Order but by mistake clause 36 was mentioned in the letter of termination. It is further stated that in a similar circumstance a writ application was dismissed by this court being CWJC No. 1816/89R directing the writ petitioner to raise dispute before appropriate forum. The respondent's further case is that the petitioner should have raised an industrial dispute and because of the alternative remedy available to the petitioner, this writ application cannot proceed.

3. Mr. V. Shivnath, learned counsel for the petitioner firstly challenged clause 36 of the Standing Order under which the services of the petitioner has been terminated as being illegal, arbitrary and ultra vires to the Constitution. Learned counsel submitted that clause 36 of the Standing Order gives arbitrary power to

the Corporation to terminate the services of an employee and the said clause is contrary to the tripartite settlement arrived at between the Corporation, Union and the Labour department, Govt, of Bihar. In this connection learned counsel put heavy reliance on the ratio decided by the Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, . Learned counsel further submitted that when clause 36 is not applicable in the case of the petitioner, then there is no other provision in the Standing Order under which his services could have been terminated in this manner. Learned counsel further submitted that it is a serious case of discrimination in as much as along with the petitioner a few persons, namely, one B.N. Pandey also appeared before the Medical Board who was working as security Jamadar and was also found unfit but he was reinstated in the service. Similarly, one Ram Das Upadhyaya working as fire supervisor, Grade II, was also found unfit by the Medical Board but he was allowed to continue in service whereas without giving any opportunity to the petitioner to make option for voluntary retirement under the aforesaid scheme, or without considering his case for giving employment to his dependant, the respondents have passed the impugned order. According to the learned counsel when the petitioner was found unfit, he should have been at least given an opportunity for any alternative option before terminating his service.

4. On the other hand, Mr. A K Sinha, learned Sr. counsel appearing on behalf of the respondent-Corporation submitted that the termination of services of the petitioner is under clause 31 of the Standing Order but due to mistake clause 36 was incorporated in the letter of termination. Learned counsel submitted that because of the nature of the disease of the petitioner it was not expedient in the interest of the Company to allow him to continue in service and, therefore, it cannot be said that the principles of natural justice have been violated. The case of The Vice-chancellor, Jammu University and Another Vs. Dushiant Kumar Rampal, was relied upon by the learned counsel in this context. Learned counsel further submitted that the writ application itself is not maintainable for the reason that admittedly alternative remedy is available to the petitioner by way of raising an industrial dispute as the services of the petitioner has been terminated by applying the Standing Order.

5. Firstly I will take up the preliminary objection raised by the Corporation with regard to maintainability of the writ petition as alternative remedy is available to the petitioner. It is well settled that when alternative efficacious remedy is available then a writ court should not invoke its extra ordinary jurisdiction under Articles 226 and 227 of the Constitution. It is equally well settled that a writ petition challenging the termination of services in terms of Standing Order is not maintainable as the remedy is available under the Industrial Disputes Act. However, recently the Apex Court in the case of State of Himachal Pradesh Vs. Raja Mahendra Pal and Others, has observed that the power of High Court under Article 226 of the Constitution is discretionary which can be invoked for the enforcement of a fundamental right or legal right but not contractual right or

when alternative remedy is available. However, this does not debar this court from granting appropriate relief to a citizen under peculiar and special fact not with standing the existence of alternative remedy.

6. In the instant case it appears that the services of the petitioner was terminated in 1992 and the writ application was filed immediately thereafter in 1992. On 13.4.93 the writ application was admitted for hearing. Thereafter, in 1999 i.e. after about 7 years the writ petition has been finally listed for hearing. In such circumstance, I am of the opinion that at the stage of hearing and that too after seven years, the writ petition cannot be thrown out on the ground that alternative remedy is available to the petitioner. It is well settled that a writ petition is maintainable when alternative remedy is inefficacious and entails such delay that the applicant would be irreparably prejudiced or subjected to lengthy proceeding and unnecessary harassment. I am, therefore, of the opinion that refusing to entertain this application at this stage would not be justified.

7. Before appreciating the rival contentions of the learned counsel of the parties on the merits of the case, it would be useful to first look into the relevant provisions of the Standing Order. The respondent-Corporation framed Standing Orders under the Industrial Employment (Standing Order) Act, 1945 (sic) which applies to all workmen/employees of the industrial establishment of the respondent-Corporation. Clause 28 of the Standing Order lays down as to which acts shall be treated as misconduct. Clause 29 speaks about the penalty for misconduct. Clause 30 lays down procedures for dealing with the cases of misconduct. Clause 31 lays down special procedures in certain cases which reads as under :

Special procedure in certain cases.-Where a workman/employee has been convicted of a criminal offence in a court of law or where the General Manager is satisfied for reasons to be recorded in writing, that it is inexpedient or against the interest of security to continue to employ the workman/employee, the workman employee may be removed or dismissed from service without following the procedure laid down in Standing Order No. 30. Clause 36 confers special power to the management to discharge and terminate the services of the employees which reads as under :

36. Discharge and Termination of Service.-Except as may be specifically provided in the contract of service, the Management may at any time discharge a workman/employee from service, or terminate his services, by giving the following notice or by payment of wages in lieu of such notice :

(a) in the case of permanent workmen/employees three months" notice.

(b) In the case of temporary workmen/employees, probationers, apprentices and construction workers having less than one year of continuous services as defined in section 2 (eee) of the Industrial Disputes Act, 1947, 14 days notice. If their services are terminated before the expiry of the specified period of their appointment or posts held by them;

(c) in the case of substitutes and casual workmen/employees, no notice. Note.-

If a workman/employee referred to in items (b) and (c) has worked for 240 days or more in a calendar year, he shall be given one month's notice.

8. From reading of clause 36 of the Standing Order it is manifest that this clause gives blanket power to the employer to terminate the services of even the permanent employee by simply giving a notice without issuing any show cause notice or giving opportunity of hearing. Such power is wholly illegal and violative of the provisions of the Constitution.

9. In the case of Central Inland Water Transport Corporation vs. Brojo Nath (supra) a similar provision i.e. rule 9 of the Central Inland Water Transport Corporation Ltd. Service Discipline and Appeal Rules, 1979 came for consideration before the Apex Court in which their Lordships held that such provision empowering the Corporation to terminate the services of its permanent employee by giving notice or pay in lieu of notice period, is opposed to Public Policy and is violative of Article 14 of the Constitution and Directive Principles contained in Arts. 39 (a) and 41 of the Constitution. Their lordships observed :

We would like to observe here that as the definition of "the State" in Article 12 is for the purposes of both part III and Part IV of the Constitution, State actions, including actions of the instrumentalities and agencies of the State, must not only be in conformity with the Fundamental Rights guaranteed by Part III but must also be in accordance with the Directive Principles of State Policy prescribed by Part IV. Clause (a) of Art. 39 provides that the State shall, in particular, direct its policy towards, "securing that the citizens men and women, equally have the right to adequate means of livelihood. Art. 41 requires the State, within the limits of its economic capacity and development, to "make effective provision for securing the right to work. An adequate means of livelihood cannot be secured to the citizens by taking away without any reason the means of livelihood. The mode of making "effective provision for securing the right to work" cannot be by giving employment to a person and then without any reason throwing him out of employment. The action of an instrumentality or agency of the State, if it frames a service rule such as clause (a) of Rule 9 or a rule analogous thereto would, therefore, not only be violative of Art. 14 but would also be contrary to the Directive Principles of State Policy contained in clause (a) of Art. 39 and in Article 41.

10. In my considered opinion, therefore, clause 36 of the Standing Order is void u/s 23 of the Indian Contract Act, 1872 as being opposed to Public Policy and is also violative of Art. 14 of the Constitution and the Directive Principles as contained in Art. 39 (a) and Art. 41 of the Constitution. Such clause 36 of the Standing Order of the respondent-Corporation is, therefore, liable to be struck down and consequently the impugned order of termination issued in exercise of powers under clause 36 of the Standing Order is also liable to be declared as illegal, arbitrary and unconstitutional.

11. Mr. A.K. Sinha, learned Sr. counsel for the Corporation however, submitted that in the impugned order of termination clause 36 has been wrongly typed. As a matter of fact, termination order of the services of the petitioner was issued exercising the powers under clause 31 of the Standing Order. Even if the contention of Mr. Sinha is accepted, the order of termination cannot be sustained in law for the reason that nothing has been mentioned in the termination letter (annexure-3) that due to a particular disease which the petitioner was suffering, it was not expedient in the interest of justice to allow him to continue in service. On the face of the termination letter, it appears that the same was issued in purported exercise of powers under clause 36 of the Standing Order and not under clause 31.

12. Be that as it may, the petitioner has made out a case of serious discrimination inasmuch as it was alleged that along with the petitioner some other employees including one B.N. Pandey appeared before the Medical Board and was found unfit to continue in the service but those employees, namely, B.N. Pandey and Ramdas Upadhaya were allowed to continue in service, whereas, without giving any opportunity to the petitioner to make option for voluntary retirement under the scheme referred to above, his services were terminated. Such action of the respondents- Corporation is illegal, arbitrary and mala fide. Having regard to the entire facts and circumstances of the case, this writ application is allowed and the impugned order of termination of services of the petitioner is set aside. It is also declared that clause 36 of the Standing Order of the Corporation is void, unconstitutional and opposed to Public Policy and, therefore, is struck down. It is further held that the petitioner shall be deemed to be in service till the date of superannuation and he will be entitled to all wages for the period he was kept out of service.