

(1978) 08 OHC CK 0022
In the Orissa High Court

Biswanath Das and Others

APPELLANT

Vs

Ramesh Chandra Patnaik and Another

RESPONDENT

Date of Decision : 09-08-1978

Acts Referred:

Constitution of India, 1950 — Article 311
Contract Act, 1872 — Section 73
Industrial Disputes Act, 1947 — Section 12, 2A, 3, 5
Specific Relief Act, 1963 — Section 14

Citation : (1978) 46 CLT 593 : (1979) 1 LLJ 129

Hon'ble Judges : P.K. Mohanti, J

Bench : Single Bench

Judgement

P.K. Mohanti, J.—The second appeal is by the defendants against a reversing decree.

2. The plaintiff was an employee of the Samaj office, an industrial establishment, owned and managed by the defendants. In a disciplinary proceeding started against him, he was suspended from service on 9-4-69 and after an ex parie enquiry he was found guilty of the charge and dismissed from service by order dated 4-7-69. The plaintiff having raised an industrial dispute, a conciliation proceeding u/s 12 of the Industrial Disputes Act was initiated and it ended in failure (vide Ext. A). He brought the suit on 14-11-69 for a declaration that the termination of his service was null and void and that he continued to be in service despite the order of dismissal and was entitled to the emoluments for the period subsequent to the date of dismissal. On 5-3-70 the State Government, on a consideration of the report of the conciliation officer, decided not to refer the dispute for adjudication by the Industrial Tribunal.

3. The defendants filed written statement contending that the civil Court has no jurisdiction to entertain the suit, that the plaintiff having pursued his remedies under the provisions of the Industrial Disputes Act he has no right to approach the civil Court for redress, that the penalty of dismissal was inflicted after due

service of notice and that the plaintiff avoided to participate in the enquiry.

4. The learned Munsif heard the question of jurisdiction as preliminary issue and by his order dated 12-12-70 came to the finding that the suit is maintainable in the civil Court, Against this order, the defendants came up in revision and this Court, by judgment dated 7th October, 1971 passed in Civil Revision No. 103 of 1971 confirmed the finding of the learned Munsif.

5. During the trial, the plaintiff wanted to amend the plaint by way of addition of alternative relief for damages for wrongful dismissal. The prayer was rejected by the trial Court.

6. After trial, the learned Munsif came to the findings that the enquiry into the charge was held without due service of notice and that the dismissal was wrongful on account of violation of the principles of natural justice and contravention of the provisions of Section 13(c)(iii) of the Standing Orders of the Samaj Establishment. He, however, dismissed the suit holding that the plaintiff was not entitled to the relief of declaration that he was continuing in service despite the order of dismissal because a contract of personal service cannot be specifically enforced. Aggrieved by this decision, the plaintiff went up in appeal. The first Appellate Court by its order dated 17-10-74 allowed the amendment of plaint and remanded the suit to the trial Court with a direction to record findings on the additional issues to be framed consequent upon the amendment of plaint.

7. After remand, the learned Munsif returned the finding that the plaintiff was entitled to a decree for Rs. 852-70 as compensation for wrongful dismissal and he was also entitled to pendente lite and future compensation at the rate of Rs. 165 per month until he attains the age of 60 years or until his death whichever is earlier. He, however, held that the plaintiff was not entitled to incremental pay, gratuity and bonus as claimed.

8. Before the appellate Court the plaintiff challenged the findings that he was not entitled to increment, gratuity and bonus. The defendants filed cross objections challenging the findings that the dismissal was wrongful and that the plaintiff was entitled to compensation of Rs. 852-70 and pendente lite and future compensation at the rate of Rs. 165 per month.

9. The Appellate Court found that the dismissal of the plaintiff was wrongful on account of violation of the principles of natural justice and contravention of the provisions of the standing orders. It also found that the conditions of service of the plaintiff were governed by the standing orders and as such he has acquired a statutory status. Accordingly it granted the relief of declaration that the dismissal was contrary to law and that the plaintiff continued to be in service of the defendants and that he was entitled to the emoluments of the service from 4-7-69 till the date of his reinstatement. The cross objection filed by the defendants was dismissed.

10. The concurrent finding of both the Courts below that the order of dismissal of

the plaintiff was made in violation of the principles of natural justice and contravention of the provisions of the standing order is not challenged in this appeal. But the findings of the Appellate Court that the plaintiff is entitled to a declaration about the continuance of his service and that he is also entitled to the emoluments of the service for the period from 4-7-69 till the date of reinstatement are assailed in this appeal as being contrary to law.

11. Mr. D.P. Mohanty, the learned Counsel appearing for the appellants, has strenuously contended that the plaintiff is not entitled to a declaration about continuance of his service because that would amount to granting a decree for specific performance of a contract for personal service which is clearly barred by Section 14(b) of the Specific Relief Act, 1963. He has also contended that an order of dismissal made in contravention of the provisions of the standing orders may be wrongful, and also illegal, giving rise to a cause of action for damages for breach of contract or for wrongful dismissal, but it cannot be said that the person wrongfully dismissed must still be deemed to be in service so that he continue to earn wages notwithstanding the termination of his employment. Mr. Ashok Muherjee, the learned Counsel appearing for the plaintiff-respondent has contended that the defendants not having followed the procedure laid down by the standing orders their act is a nullity and the Court, under such circumstances, is entitled to make a declaration that the plaintiff continues to be in service.

12. The crucial question for consideration in the present appeal are: firstly, whether the standing orders framed under the Industrial Employment (Standing Orders) Act, 1946 have statutory force, and secondly, even if those have statutory force whether an order of dismissal in violation of the provisions of the standing orders is a nullity so as to entitle the employee to get a declaration that in spite of the dismissal he still continues to be in the service of his employer.

13. The Standing Orders (Ext. 17) of the industrial establishment of the defendants have been framed under the Industrial Employment (Standing Orders) Act, 1946. The object of the Act is to require employers in industrial establishments to define with sufficient precision the conditions of employment of workmen employed therein and to make them known to such workmen. Before the passing of the Act there was nothing in law to prevent an employer having different contracts of employment with workmen which led to confusion and made possible discriminatory treatment. This was also clearly incompatible with the principle of collective bargainings. Section 3 of the Act was enacted to do away with such diversity and bargains with each individual workmen. The authorities functioning under the Act are duty-bound to examine the fairness or reasonableness of the standing orders before they are certified. The same duty is cast on the authorities when a proceeding is taken for modification of the standing orders. The model standing orders prescribed under the Act get replaced by the certified standing orders. The employer cannot enter into any agreement with a workman which is inconsistent with the standing orders. The

violation of the standing orders by the employer is a criminal offence. Having regard to these features of the standing orders, it is difficult to accept that the certified standing orders have not the force of law. In this connection, I may refer to the case of *The Bagalkot Cement Co. Ltd. Vs. R.K. Pathan and Others*, , where the following observations were made:

...Prior to the passing of the Act, conditions of employments obtaining in several industrial establishments were governed. by contracts between the employer and their employees. Some times the said conditions were reduced to writing and in many cases they were not reduced to writing but were governed by oral agreements. Invariably in many cases, the conditions of service were not well-defined and there was ambiguity or doubt in regard to their nature and scope. That is why the Legislature took the view that in regard to industrial establishments to which the Act applied, the conditions of employment subject to which industrial labour was employed should be well-defined and should be precisely known to both the parties, With that object, the Act has made relevant provisions for making standing orders which after they are certified,, constitute the statutory terms of employment between the industrial establishments in question and their employees....

In the case of *Workmen of Dewan Tea Estate and Others Vs. The Management*, , their Lordships held that after a standing order is certified by the Statutory Authority u/s 5 of the Act, it becomes "part of the Statutory terms and conditions of service between the employer and employees of the industrial establishment concerned. It is true that the standing orders may have been framed by a private industrial establishment which comes within the purview of the Act. But the Act provides for the conditions of service of employees of such establishments, which were previously left to the agreement of the parties, to be brought under statutory control. There is, therefore, no manner of doubt that the certified standing orders framed in accordance with the Industrial Employment (Standing Orders) Act, have the force of law like any other statutory instrument.

14. The next question for consideration is whether an order of termination of service in violation of the provisions of the standing orders would make the order a nullity so as to entitle the employee to ask for a declaration that in spite of the termination of service he still continues to be in service. (under the common law, the Court will not ordinarily force an employer to retain the services of an employee whom he no longer wishes to employ. But this rule is subject to certain well-recognised exceptions. It is open to the Courts in an appropriate case to declare that a public servant who has been dismissed from service in contravention of Article 311 of the Constitution continues to remain in service, even though by so doing the State is in effect forced to continue to employ the servant whom it does not desire to employ. Similarly, under the Industrial Law, jurisdiction of the Labour and Industrial Tribunals to compel the employer to employ a worker, whom he does not desire to employ, is recognised. The Courts are also invested with power to declare invalid the act of a statutory body, if by

doing the act the body has acted in breach of a mandatory obligation imposed by statute, even if by making a declaration the body is compelled to do something which it does not desire to do. But it is not every breach of a statutory provision that will entitle the employee to ask for a declaration that despite the order of dismissal he still continues to be in service. It is only when a statutory status is given to an employee and there has been a violation of the provisions of the statute while terminating the services and the statutory status of the employee has been affected the employee will be entitled to get a declaration that the order is a nullity and that he continues to be in service vide *S.R. Tewari Vs. District Board Agra and Another*, and *Executive Committee, U.P. Warehousing Corporation Vs. Chandra Kiran Tyagi*, . In *Sirsi Municipality by its President Sirsi Vs. Cecelia Kom Francis Tellis*, the Supreme Court made a distinction between public authority or the State and a private employer as would appear from the following observations:

The Courts keep the State and the public authority dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the Courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such implication of public employment is thus distinguished from private employment in pure cases of master and servant.

In that case the Supreme Court also made a distinction between dismissal of an employee in the context of contractual relation of master and servant in general and the dismissal of a servant by a statutory body in breach of the provisions of a statute which regulates the exercise of its power. It was held that it is only in the latter class of cases that a dismissal in violation of the statutory provisions can be declared invalid or ultra

15. The establishment is not a statutory body because it is not created by any statute. It is contended that by virtue of the standing orders, the plaintiff acquired a statutory status and as there was a violation of the provisions of the standing orders, he is entitled to the declaration sought for. I am unable to accede to this contention. The standing orders do not confer any status upon the employee. They merely incorporate certain terms and conditions in the contract of service by virtue of the statute. That is quite different from giving a statutory status to an employee. The contract of service nevertheless remains a contract for personal service. Therefore, making a declaration that the employee continues to be in service despite the order of dismissal would amount to enforcing the contract act of personal service which is clearly barred by Section 14(b) of the Specific Relief Act, 1963.

16. It is next contended that where there is a breach of statutory obligation which prevents the termination of the contract except in the manner prescribed by the statute, the dismissal being in breach of the statute is null and void and the servant continues in the employment of the master. This contention is equally untenable. It may be so in case of a statutory body whose rights and obligations

are regulated by statute creating it. But the position is quite different in the case of a private employer. In such a case, the dismissal from service in violation of the standing orders would nevertheless be a breach of contract between the master and servant and the remedy which the dismissed employee is entitled to claim is compensation for breach of contract or wrongful dismissal.

17. In *J. Melby D'Cruz and Others Vs. The Chief Administrative Officer, Travancore Minerals Ltd. and Others*, , it was held that an order of dismissal without following the provisions of the standing orders may be wrongful and may also be illegal, giving rise to a cause of action for damages for breach of contract or for wrongful dismissal, but it cannot be said that the person wrongfully dismissed must still be deemed to be in service so that he continues to earn the wages despite the termination of his employment.

Similar view has been expressed by a Division Bench of the Calcutta High Court in a recent decision reported in *Calcutta Electric Supply Corporation. Ltd. v. Ramratan Mahato* (1915) *Labour and Industrial cases* 740.

In the case of *Dr. Bool Chand Vs. The Chancellor, Kurukshetra University*, , the Court referred to certain English cases where the authority appointing a servant was acting in exercise of statutory authority but the relation between the person appointed and the employer was contractual and it was held that the relation between the employer and the employee being that of master and servant, termination of relationship will not entitle the servant to a declaration that his employment has not been validly terminated,

18. It follows that the foregoing discussions that the present case does not fall within any of the well-recognised exceptions where the Court can grant a declaration that the order of dismissal is null and void and that the employee is deemed to be continuing in service,

19. Under the common law a servant wrongfully dismissed from service can maintain an action for damages against the master. But he cannot rest content by merely putting forward a claim by way of damages. For recovery in a lump sum and in advance the entire amount of anticipated salary for the whole period for which he expected to continue in service. The common law which recognises his right to recover damages for wrongful dismissal imposes a corresponding duty on him to do all that is possible to mitigate such damages. Section 73 of the Indian Contract Act provides for compensation for breach of contracts whether they are commercial contracts or service contracts.

20. The substantive portion of Section 73 lays down the basic rule that a party who suffers by the breach is entitled to receive from the party in breach "compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach." The explanation to the section lays down that in estimating the loss or damages arising from the breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

21. The Supreme Court in the case of Murlidhar Chiranjilal Vs. Harishchandra Dwarkadas and Another, , examined the scope of Section 73 and the explanation thereto while dealing with a case arising out of a breach of contract of sale of goods and laid down the principles on which damages for the breach of contracts have to be determined. The principles have been stated in para. (9) of the judgment in the following terms:

The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps : (British Westing-house Electric and Manufacturing Co. Limited v. Underground Electric Ry. Co. of London [1912] A.C. 673 at p. 683. These two principles also follow from the law as laid down in Section 73 read with the explanation thereof.

22. Coming to the facts of the present case, it appears that the plaintiff has not taken any steps to mitigate the loss caused by the breach of the contract. There is nothing to show that he made any effort to secure similar employment with other similar firms. Thus, he has disentitled himself from claiming, by way of damages, the remuneration which he would have got for the entire unexpired portion of his service. The question of fixing the quantum of damages does not, however, arise because, as I shall presently discuss the plaintiff's suit, in the particular facts and circumstances, is not maintainable

23. It is urged on behalf of the appellants that in view of the provision of Section 2A of the Industrial Disputes Act, a workman on being dismissed by his employer cannot take recourse to the civil Court as a dispute arising out of that matter is to be treated as an industrial dispute, and the workman has to seek his remedies as provided under the Act. It is further contended that the plaintiff once having moved the machinery under the Act for adjudication of the dispute cannot approach the civil Court for redressal of his grievances arising out of the same dispute.

24. The question as to whether the civil Court has jurisdiction to entertain a suit to decide a dispute of the present nature came up for consideration before the Supreme Court in the case of The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others, . On a review of the various English and Indian authorities on the subject their Lordships laid down the principles applicable to the jurisdiction of the civil Court in relation to an industrial dispute in the following terms:

...But where the industrial dispute is for the purpose of enforcing any right, obligation or liability under the general law or the common law and not a right,

obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the civil Court. It is plain that he can have both. He has to choose the one or the other.

25. There can be no doubt that the right arising out of wrongful dismissal of a workman is a right under the general or common law and not the right which arises under the specific provisions of the Act. So, in the light of the principles laid down by the Supreme Court the plaintiff in the present case could elect to choose his remedy either by moving the machinery under the Act or by approaching the civil Court. He could not have both, and has to choose one or the other. Admittedly the plaintiff had moved the Labour Commissioner u/s 12 of the Act and the conciliation officer had submitted his report of failure. Thereafter the State Government on a consideration of the report of the conciliation officer decided not to refer the dispute for adjudication by the Industrial Tribunal. Without moving the conciliation officer, the plaintiff in a matter of this nature could directly approach the civil Court for enforcing his right as the same arises under the general law or the common law; but having elected to seek his remedy under the provisions of the Act he cannot again approach the civil Court for redressal of his grievances arising out of the order of dismissal passed against him. It is contended on behalf of the plaintiff-respondent that the question of jurisdiction of the civil Court to entertain the present suit have been once adjudicated by this Court in Civil Revisions No. 103 of 1971 it cannot be reagitated. This contention is not acceptable in view of the authoritative pronouncement of the Supreme Court in *The Premier Automobiles Ltd. Vs. Kamlekar Shantaram Wadke of Bombay and Others*, referred to above. It has been clearly laid down that the decisions which had taken any view contrary to the one expressed by their Lordships on the point in question must be deemed to have been overruled in that regard and those failing in line with their Lordships' views affirmed. That being so, the decision of this Court in Civil Revision No. 103 of 1971, decided on 7th October, 1971 is of no assistance to the plaintiff. In a recent decision of this Court reported in *Jeypore Sugar Co. Ltd. and Ors. v. D. Jayaraj* (1977) 2 C.W.R. 737, a learned single Judge, of this Court, relying on the aforesaid decision of the Supreme Court, held that a dispute relating to the dismissal of a workman by his employer is a dispute arising out of a right under the general or the common law and that the workman having chosen to move the conciliation officer u/s 12 of the Industrial Disputes Act could not again have access to the civil Court for the same cause of action even though the conciliation proceeding ended in failure and the State Government declined to make a reference for adjudication of the dispute by the Industrial Tribunal. I am in respectful agreement with the view expressed by the learned Judge.

26. In view of my foregoing findings the appeal is allowed, the decree passed by the Court below is set aside and the plaintiff's suit is dismissed, but in the circumstances I direct that each party will bear its own costs throughout.