

(1994) 04 OHC CK 0031

In the Orissa High Court

Case No : Original Jurisdiction Case No. 5261 of 1991

Nrusingha Charan Sahoo

APPELLANT

Vs

National Textile Corporation (WBABO) Ltd. and Others

RESPONDENT

Date of Decision : 15-04-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20
Constitution of India, 1950 — Article 226, 227

Citation : (1994) 78 CLT 442 : (1994) 1 OLR 510

Hon'ble Judges : G.B. Pattnaik, J;B. Panigrahi, J

Bench : Division Bench

Advocate : D.S. Misra, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

B. Panigrahi, J.—Being aggrieved by the order of termination dated 27-7-1986 and the dismissal of the appeal by order dated 27-4- 1989, annexed as Annexure-2, the petitioner has approached this Court.

2. Petitioner's case, in brief, is that after the death of his father in May, 1976, who was an employee in Rampooria Cotton Mills, a Unit under the National Textile Corporation, the petitioner applied for a job on 4-6-1980. After waiting for two and half years, the petitioner got an appointment as Apprentice on 25-12-1983. Though the management asserts that the appointment was as a "Badli", but the petitioner asserts that he was a regular employee, he having been issued with a Permanent Ticket No. 12076. While continuing in service, he remained absent from duty on account of his illness and applied for leave on medical ground accompanied by the medical certificate. The employer instead of granting leave to the petitioner ultimately terminated his service on 27-7-1986 without initiating any proceeding against him and without finding him guilty of any charges. Prior to the said termination, to General Manager, National Textile Corporation, had written a letter to petitioner to his home address stating therein that the irregular attendance of the petitioner is not conducive to maintenance of

discipline in the Department and hampers production in the Department and the petitioner has violated the undertaking of not absenting himself from duties without proper sanction of leave and called upon the petitioner to join within eight days failing which his name would be struck off from the muster roll. The said document is annexed to the writ application as Annexure-3(a), A similar letter was also received by the petitioner from the General Manager, National Textile Commissioner, annexed as Annexure-3(b) and finally the intimation that his name has been struck off by letter dated 27-7-1986, annexed as Annexure-3(c). The petitioner thereafter filed some representation and then on the basis of an assurance from the Management that his case for reinstatement will be re-considered and the order of termination will be withdrawn if the petitioner admits his fault, the petitioner was forced to write a letter on 29-10-1986 But even thereafter his case was not considered and he filed an appeal to the Chairman on 13-2-1989, annexed as Annexure-5. The appellate authority did not entertain the appeal as per Annexure-2. The petitioner then filed an application in this Court which was registered as OJC No. 1162 of 1991, but as the application did not contain sufficient materials, In course of hearing he withdrew the same with liberty of re-filing and accordingly re-filed the present application on 8-11-1991 which was registered as OJC No. 5261 of 1991.

The main ground on which the petitioner assails the legality of the order of termination is that without holding a disciplinary proceeding levelling charges against the petitioner, ipso facto an order of termination could not have been passed merely on the ground of absence of the petitioner, particularly when the petitioner had applied for leave on the ground of illness and had appended medical certificate in support of the same. So far as the appellate order is concerned, the main ground of attack is that the appellate order is not a speaking order and the appellate authority does not appear to have applied his mind to the contentions raised in the memorandum of appeal.

3. Pursuant to notice issued by the Court, the opposite parties filed an affidavit, but did not enter appearance through any counsel and the said counter affidavit was directed to be ignored by order dated 24-1-1994 if the opposite parties fail to enter appearance within a week from the date of the order. No appearance having been made in accordance with the aforesaid order, the counter affidavit stood ignored from consideration.

Even though legally the counter affidavit stands excluded from consideration, but since it is open for a party to file an affidavit in Court and in that event the Court is bound to look to the same, we have also gone through the counter affidavit filed on behalf of the opposite parties. The stand taken in the counter affidavit is that the petitioner having withdrawn the writ application filed earlier being OJC No. 1162 of 1991 a fresh application is barred by the principle of res judicata and that the order of termination having been passed at a place beyond the jurisdiction of this Court, this Court is not entitled to entertain an application under Article 226 of the Constitution. So far as the legality of the order of

termination is concerned, the stand taken in the counter affidavit is that the petitioner while unauthorisedly absented himself, the employer had intimated him by letter dated 3-6-1986 [Annexure- 3(b)] that unless the petitioner resumes his duty within eight days from the date of receipt of the order, then it would be presumed that the is no longer interested in his assignment and the petitioner not having joined within ten days, the employer was entitled to terminate the services of the petitioner.

4. In view of the rival stands of the parties the following questions really emerge for our consideration :

(i) Does the principle of res judicata apply to the case in hand because of the withdrawal of the earlier writ application which was registered as OJC No. 1162 of 1991 ?"

(ii) Notwithstanding issuance of letter under Annexure-3(b) is the employer entitled to terminate the services of an employee without initiating a disciplinary proceeding and without following the entire amount of procedure and without finding him guilty of certain charges ?

(iii) Does this Court have jurisdiction to entertain the writ application ?

5. So far as the first question is concerned, there is no dispute with the proposition that the principle of res judicata applies to writ applications also where a writ application is heard and disposed of on merits. But where a writ application filed in this Court was withdrawn with permission of the Court to re-file the same by giving adequate and detailed particulars as is reflected in the order dated 30-7-1991 passed in OJC No. 1162 of 1991, and pursuant to such permission, the present writ application was filed, the principle of res judicata will not apply. This stand of the opposite parties therefore, must be rejected.

6. So far as the second question is concerned, it is well settled that the relationship of master and servant does not automatically cease, unless the appointment itself is for a fixed tenure. The petitioner's appointment was admittedly not for any fixed tenure. Therefore, unless the employer passes an order of termination, relationship of master and servant continues. An employer can pass an order of termination by initiating a disciplinary proceeding against the employee by framing some charges against him and establishing those charges in course of an enquiry and finding him guilty. Even though the petitioner was remaining absent unauthorisedly as alleged by the employer, but no disciplinary proceeding has been initiated nor any charges have been framed, nor the petitioner has been found guilty of those charges. By mere issuance of a letter as per Annexure-3(b) calling upon the employee to rejoin the service within eight days failing which his services would come to an end, the relationship cannot come to an end. There is no material to indicate and even the opposite parties in their counter affidavit have not taken a stand that any proceeding has been initiated against the petitioner and in that proceeding any charges have been framed and the petitioner has been found guilty therein.

Therefore, the impugned order of termination must be held to be invalid, inoperative and illegal particularly when the petitioner while was staying away from duty has been filing applications for grant of leave accompanied by medical certificates. In the premises, as aforesaid, the conclusion is irresistible that the termination of the petitioner from service is illegal and invalid.

7. So far as the third question is concerned, it is no doubt true that the order of termination was passed by the authority at a place not coming within the jurisdiction of this Court, But the fact that communications had been made to the petitioner to his village address, which is within the jurisdiction of this Court, and the refusal of the appeal having been communicated" to the petitioner to his village address. this Court will have jurisdiction to entertain the writ application.

8. One other question which also incidentally crops up for consideration is whether the appellate order not entertaining the appeal can be said to be a speaking order. When an appeal is provided for under any service rules, the appellate authority is duty bound to pass a speaking order by indicating that he rejects the appeal or allows the appeal, so that the legality of the same can be tested in any higher forum. In the case in hand, the impugned order passed by the appellate authority, annexed as Annexure-2, can hardly be said to be a speaking order, On this ground also, the appellate order is vitiated.

9. In view of our conclusions, as aforesaid, the order of termination as well as the appellate order under Annexure-2 having been held to be vitiated, the petitioner is entitled to reinstatement in service. But since the petitioner has not discharged his duties and also the petitioner's conduct cannot be said to be above board, inasmuch as he was absenting himself from duty without due sanction of leave, we are of the opinion that he is not entitled to any back wages. We would accordingly allow this writ application directing the opposite parties to reinstate the petitioner by giving him an order of posting within four weeks from the date of receipt of our order, but we direct that the petitioner would not be entitled to any back wages.

The writ application is accordingly allowed to the extent indicated above. There will, however, be no order as to costs.

G.B. Pattnaik, J.

10. I agree.