
(2009) 07 OHC CK 0045
In the Orissa High Court

Prasanna Kumar Pani

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Evidence Act, 1872 — Section 115

Citation : (2009) 108 CLT 319 : (2009) 2 OLR 987 Supp

Hon'ble Judges : L. Mohapatra, J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed challenging the order of the Orissa Administrative Tribunal (in short "the Tribunal") dated 26.06.2008 passed in O.A. No. 31/2004 refusing to quash the Order Dated 04.12.2003 (Annexure-6) by which the Petitioner had been relieved from government service with effect from 04.12.2003 under the Voluntary Retirement Scheme (in short, "VRS").

2. The facts & circumstances giving rise to the present Writ Petition are that the Petitioner who claims to be a permanent government servant joined service as a Peon on 19.10.1967. He was due to retire from service on 30.06.2009 after attaining the age of superannuation, i.e. at the age of sixty years. On 11.03.2003, while working as night-watcher under the Executive Engineer, M.I.I. Division, Berhampur (O.P. No. 3), he applied for voluntary retirement from government service in pursuance of the Government of Orissa Finance Department Resolution dated 27.01.2003 proposing to take voluntary retirement from 01.07.2003. On the very day, i.e., on 11.03.2003, O.P. No. 3 vide Annexure-3 communicated the Petitioner that his application filed under VRS for voluntary retirement from government service with effect from 01.07.2003 had been accepted. On 10.06.2003, an application under Annexure-4 was made by the wife of the Petitioner to O.P No. 3 for cancellation of the application dated 11.3.2003 made by the Petitioner under VRS with copy to Chief Engineer M.I. (O), BBSR, Superintending Engineer, S.M.I. Circle, Berhampur & A.G., Orissa for

information & necessary action. Opposite Party No. 3 vide Order Dated 30.06.2003 (Annexure-5) intimafSa" the Petitioner that his application for voluntary retirement from government service under VKS accepted by his Office Order No. 459 dated 11.03.2003 was cancelled & withdrawn & lie had been allowed to continue in government service as usual. Pursuant to the said order, the Petitioner without being retired from server with effect from 01.07.2003 continued in service & was paid his regular salary till he was relieved from service. On 04.12.2003, O.P. No. 3 vide his order (Annexure-6) relieved the Petitioner from government service with effect from 04.12.2003 forenoon. The Petitioner challenged the said Order Dated 4.12.2003 (Annexure 6) in O.A. No. 31/2004 before the Learned Tribunal with a prayer to quash Annexure-6, which was rejected by the Learned Tribunal & the O.A. was dismissed. Hence, this petition.

3. The Petitioner, who appeared in person submitted for quashing the Order Dated 04.12.2003 passed by Opp. Party No. 3 under Annexure-6 & the Order Dated 26.06.2008 under Annexure-7 by which the Learned Tribunal refused to quash Annexure-6. It was submitted that as the application made on behalf of the Petitioner for cancellation of the application made under VRS was accepted by O.P. No. 3 allowing the Petitioner to continue in government service as usual as per Annexure 5 by canceling/withdrawing the previous order passed under Annexure 3 & the Petitioner in fact continued in government service without being retired with effect from 01.07.2003 from service, O.P. No. 3 was estopped u/s 115 of Evidence Act, 1872 to pass such impugned order as in Annexure-6. Since prior to the proposed date of retirement, i.e., 01.07.2003 O.P. No. 3 cancelled his order passed under Annexure 3, the subsequent order passed under Annexure-6 is not sustainable in the eye of law. It amounts to compulsory retirement from government service without any reason whatsoever. The Voluntary Retirement Scheme being a beneficial scheme should be interpreted liberally. Concluding his argument, the Petitioner submitted that the Opposite Parties may be directed to act in accordance with the order passed in Annexure 5 & the Petitioner may be provided with all service & financial benefits.

4. Per contra, Learned Addl. Government Advocate vehemently contended that application for voluntary retirement made under VRS once accepted & communicated to the employee concerned cannot be withdrawn. The Petitioner was allowed to continue in service under Annexure-5 till a final decision was taken by the Government. After careful consideration, the Government in Water Resources Department, Orissa, Bhubaneswar vide letter No. 41205 dated 01.12.2003 did not allow the Petitioner to withdraw his application made under VRS as the same had already been accepted & communicated to the Petitioner. Therefore, the present Writ Petition is liable to be dismissed.

5. The Learned Tribunal dismissed the Petitioner's Original Application on the ground that Clause 13(i) of the Government of Orissa Finance Department Resolution No. PEN/2003/4481/F dated 27.01.2003 clearly stipulates that the

application for voluntary retirement cannot be withdrawn after its acceptance & communication to the employee concerned. The wife of the Petitioner made a representation to the Government & pending decision at the Government level the Petitioner was allowed to continue in service. The Government has taken a decision that the Petitioner cannot be allowed to withdraw his application for voluntary retirement since its acceptance had already been communicated to the Petitioner. Merely because the Petitioner was permitted to continue in service for a particular period, pending decision by the Government, it cannot confer any right on him to continue in service till the actual date of his retirement. Vires of the said resolution was not under challenge. Hence, the Petitioner was not entitled to the relief claimed in the Original Application.

6. The undisputed facts are that pursuant to the Resolution dated 27.01.2003 of the Government of Orissa in the Finance Department (Annexure-1) the Petitioner made an application on 11.03.2003 under VRS to take voluntary retirement with effect from 01.07.2003, which was accepted promptly on the same day & communicated to the Petitioner. Subsequently, on 10.06.2003, the wife of the Petitioner made an application (Annexure-4) for cancellation of the application made by the Petitioner under VRS & such request was also accepted by O.P. No. 3 who vide his Order Dated 30.06.2003 (Annexure-5) intimated the Petitioner that his application for voluntary retirement from government service under VRS accepted by office order No. 459 dated 11.03.2003 had been cancelled & withdrawn & he was allowed to continue in Government service as usual. The plea of the Opposite Parties & the observation of the Learned Tribunal that the Petitioner was allowed to continue in service till a final decision was taken by the Government & that after careful consideration the Government in Water Resources Department, Orissa Bhubaneswar vide their letter No. 41205 dated 01.12.2003 had not allowed the Petitioner to withdraw his application for voluntary retirement was not at all communicated to the Petitioner. On the contrary, the Petitioner had been communicated vide Annexure 5 that his application for voluntary retirement from government service under VRS accepted by the O.P. No. 3 was cancelled & withdrawn & he was allowed to work as usual. At this juncture, it may be relevant to quote the Order Dated 30.6.2003 (Annexure5), which is as follows:

Office Of the Executive Engineer: M.I.I. Division: Berhampur Office Order No.

Dt.

In pursuance of Govt. of Orissa Deptt. of Water Resources Lr. No. 21589 dt.26.6.2003 communicated in Memo No. 3910 dt.30.6.03 & Lr. No. 3921 dt.30.6.03 of S.E., S.M.I. Circle, Berhampur, the application for Voluntary retirement from Govt. Service under VRS in favour of Sri P.K. Pani, Night Watcher of this office, accepted by this office order No. 459 dt. 11.3.2003 is hereby cancelled & withdrawn & allowed to continue in Govt. service as usual.

Sd/- K.K. Kar, Executive Engineer M.I.I. Divn, Berhampur

Memo No. 1148 Dt.30.6.2003

Copy to Sri P.K. Pani, N/W of this office for information & necessary action with reference to his representation dt.30.6.2003.

Executive Engineer

Memo No. Dt. Copy to Superintending Engineer, S.M.I. Circle Berhampur for favour of kind information with reference of kind 30 6.2003, Lr.No.3921/30.6.2003 & in continuation of this office Ir. No. 461/11.3.2003.

Executive Engineer

Memo No. Dt. Copy submitted to the Chief Engineer, M.I.(O) Bhubaneswar for favour of kind information with reference to Lr. No. 29588 dt.26.3.2003 of Under Secretary to Govt., W.R. Deptt. addressed to C.E., M.I.(O), Bhubaneswar.

Executive Engineer

Memo No. Dt. Copy submitted to the A.G.(A&E) Orissa, Bhubaneswar for favour of kind information.

Executive Engineer

Memo No. Dt. Copy submitted to the Under Secretary to Govt. of Orissa, Deptt. of Water Resources for favour of kind information & necessary action with reference to his Lr. No. 21588 dt.26.6.2003 addressed to the C.E., M.I.(O) Bhubaneswar.

Executive Engineer

A plain reading of the above order makes it amply dear that Petitioner's application dated 11.03.2003 for voluntary retirement under VRS with effect from 01.07.2003, which was accepted by O.P. No. 3 & communicated to the Petitioner, was subsequently cancelled & withdrawn & the Petitioner was allowed to continue in government service as usual by O.P. No. 3 In the said order (Annexure-5), nothing is mentioned regarding the plea taken by O.P. No. 1 that the Petitioner was allowed to continue in service till a final decision was taken by the Government on the Petitioner's application.

7. The contention of the Opposite Parties that application for voluntary retirement under the VRS cannot be withdrawn after its acceptance was communicated to the employee concerned is of no help to the Opposite Parties as the said acceptance was subsequently cancelled & the Petitioner was allowed to work as usual by O.P. No. 3 vide Annexure 5 prior to the proposed date of retirement, i.e., 01.07.2003 was reached. The Petitioner never acted upon such acceptance of the employer & took retirement from service on the proposed date, i.e., 01.07.2003. On the contrary, he continued in service as usual under O.P. No. 3 even on & after the proposed date of retirement, i.e., 01.07.2003 till he was relieved from service on 04.12.2003 compulsorily & he had been paid his salary regularly till 04.12.2003. In such a situation, it cannot be said that the

offer of the Petitioner for voluntary retirement under VRS & the acceptance of the same by O.P. No. 3 remained in force even after cancellation of such acceptance by O.P. No. 3 vide Annexure-5 & the Petitioner continued in service as usual on & after the proposed date of retirement till he was illegally relieved from service. The Learned Addl. Standing Counsel miserably failed to convince us as to why in the said order (Annexure-5) it was not intimated to the Petitioner that he was allowed to continue in government service till a final decision is taken by the Government on his representation. In the present case, the Petitioner is a night watcher, a class-IV employee, & the employer is the mighty State. After an order is passed accepting the request for cancellation of the application made under VRS, it is not desirable on the part of the State not to act in accordance with its own order so passed under Annexure-5.

8. The Hon''ble Supreme Court in *Balram Gupta v. Union of India* and Anr. 1988 SCC 126 held that notice of voluntary retirement can be withdrawn at any time before retirement becomes effective. In that case, the Appellant after completing more than 20 years'' government service, offered by his letter dated December 24, 1980 to retire voluntarily from service w.e.f. March 31, 1981 by treating the notice period w.e.f. January 1, 1981. The Respondent-Government by its letter dated January 20, 1981 allowed the Appellant to do so. However, in the meantime, the Appellant stated that on account of persistent & personal requests from the staff members, he had to change his mind & accordingly by his letter dated January 31, 1981 he sought to withdraw his notice of voluntary retirement. But the authority concerned disallowed the appellant's request under Rule 48-A (4) of the Central Civil Services (Pension) Rules which precludes a government servant from withdrawing his notice "except with the specific approval of such authority". Allowing the appeal with costs the Hon''ble Supreme Court held that there was no valid reason for withholding the permission by the Respondent. Therefore, the Appellant was entitled to be put back to his job with all the consequential benefits treating him to be in the job from March 31, 1981 The retirement from the government service was to take effect at a subsequent date prospectively & that the withdrawal was long before that date. Therefore, the Appellant had locus poenitentiae. The dissolution of the contract of employment would be brought about only on the date indicated i.e. March 31, 1981 & up to that, the Appellant was & is a government employee. There is no unilateral termination of the same prior thereto. Being a government servant, he is at liberty & entitled independently without adhering to sub-rule (4) of Rule 48-A of the Pension Rules, to withdraw his notice of voluntary retirement. In this respect, it stands at par with letter of resignation.

In *Punjab National Bank Vs. P.K. Mittal*, , the Hon''ble Supreme Court again examined the case wherein the employee tendered his resignation on 21.01.1986 to be effective on 30.06.1986. The resignation was accepted on 07.02.1986 pointing out that it had been accepted by the Authority with immediate effect. The Apex Court held that the Authority had no competence to advance the date of its effectiveness & resignation, if accepted, it could have

become effective only on 30.06.1986 & as the resignation was to be effective with future date, the employee had a right to withdraw the same prior to 30.06.1986.

The Apex Court in J.N. Srivastava Vs. Union of India (UOI) and Another, held that it is well settled that even if the voluntary retirement notice is moved by an employee & gets accepted by the authority within the time fixed, before the date of retirement is reached, the employee has locus poenitentiae to withdraw the proposal for voluntary retirement.

The Hon"ble Supreme Court in Shambhu Murari Sinha Vs. Project and Development India and Another, held as under:

From the facts stated above, it would be seen that though the option of voluntary retirement exercised by the Appellant by his letter dated 18.1.0.1995 was accepted by the Respondent-Management by their letter dated 30.7.1997, the Appellant was not relieved from service & he was allowed to continue in service till 26-9-1997, which, for all practical purposes, would be the "effective date" as it was on this date that he was relieved from service. In the meantime, as pointed out above, the Appellant had already withdrawn the offer of voluntary retirement vide his letter dated 7-8-1997. The question which, therefore, arises in this appeal is whether it is open to a person having exercised option Of voluntary retirement to withdraw the said offer after its acceptance but before it is made effective. The question is squarely answered by three decisions, namely, Balram Gupta v. Union of India, J.N. Srivastava v. Union of India & Power Finance Corporation Ltd. v. Pramod Kumar Bhatia in which it was held that the resignation, in spite of its acceptance, can be withdrawn before the "effective date". That being so, the appeal is allowed. The impugned Judgment of the High Court is set aside with the direction that the Appellant shall be allowed to continue in service with all consequential benefits.

9. In view of the above legal propositions, it cannot be said that the Petitioner had no locus standi to withdraw his proposal for voluntary retirement before the date for voluntary retirement is reached. As stated above, an application for cancellation of the application for voluntary retirement was not only made before the proposed date of retirement was reached, the same was also accepted by O.R No. 3 who cancelled the said order accepting the request made on behalf of the Petitioner vide Annexure 5.

10. In view of the above, we have no hesitation to hold that the Petitioner was all along in service till the date of superannuation which is stated to be on 30.06.2009, when he attained the age of superannuation. The Opposite Parties-authorities will have to make good to the Petitioner with all pecuniary benefits by treating him to be in continuous service till the actual date of his superannuation as the Petitioner was always ready & willing to work but O.R No. 3 illegally relieved him from service on 04.12.2003 for no fault of the Petitioner even after allowing him to continue in service vide Annexure 5 & work on & after the

proposed date of retirement, i.e., 01.07.2003. This entitles him to get all arrear salary, other emoluments including increment & pensionary benefits subject to adjustment of any pension & other retirement benefits already paid to the Petitioner in the meantime up to the date of his actual retirement. Our above view gets support from the decision of the Hon"ble Supreme Court in Srikantha S.M. Vs. Bharath Earth Movers Ltd., , wherein it is held as under:

28. The next question is, as to what benefits the Appellant is entitled to. As he withdrew the resignation & yet he was not allowed to work, he is entitled to all consequential benefits. The Learned Counsel for the Respondent Company no doubt contended that after 15.01.1993, the Appellant had not actually worked & therefore, even if this Court holds that the action of the Respondent Company was not in consonance with law, at the most, the Appellant might be entitled to other benefits except the salary which should have been paid to him. According to the Counsel, the principle of "no work, no pay" would apply & when the Appellant has admittedly not worked, he cannot claim salary for the said period.

29. We must frankly admit that we are unable to uphold the contention of the Respondent Company. A similar situation had arisen in J.N. Srivastava & a similar argument was advanced by the employer. The Court, however, negated the argument observing that when the workman was willing to work but the employer did not allow him to work, it would not be open to the employer to deny monetary benefits to the workman who was not permitted to discharge his duties. Accordingly, the benefits were granted to him. In Shambhu Murari Sinha II also, this Court held that since the relationship of employer & employee continued till the employee attained the age of superannuation he would be entitled to "full salary & allowances" of the entire period he was kept out of service. In Balram Gupta in spite of specific provision precluding the government servant from withdrawing notice of retirement, this Court granted all consequential benefits to him. The Appellant is, therefore, entitled to salary & other benefits.

11. In view of the above, we quash the Order Dated 04.12.2003 under Annexure-6 passed by O.P. No. 3 & set aside the Order Dated 26.06.2008 under Annexure-7 passed by the Learned Tribunal & direct the Opposite Parties to give effect to this Judgment within a period of three months from the date of receipt of a copy of this Judgment.

12. In the result, the Writ Petition is allowed. No costs.

L. Mohapatra, J.

I agree.