

(2023) 08 OHC CK 0113

In the Orissa High Court

Case No : Writ Petition (C) No. 9144 Of 2017

Smt. Sakuntala Dash

APPELLANT

Vs

State Of Odisha And Others

RESPONDENT

Date of Decision : 18-08-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2023) 08 OHC CK 0113

Hon'ble Judges : Sashikanta Mishra, J

Bench : Single Bench

Advocate : Karunakar Jena, S.N.Pattnaik

Final Decision : Partly Allowed

Judgement

Sashikanta Mishra, J

1. The Petitioner has approached this Court seeking the following relief;

"It, is therefore, prayed that this Hon'ble Court may be pleased to admit the Writ Petition, issue notice to the Opp. Parties to show cause as to why the Opp. Parties shall not be directed to regularize the service of the Petitioner from 14.7.2003 to 24.7.2007 and as to why they shall not be directed to release the arrear salary along with all consequential service benefits to the petitioner and if the Opp. Parties fail to show cause or show insufficient/irrelevant cause, the Hon'ble Court after hearing all the parties may be pleased to quash the order vide letter No.2754/5T-88-10-VI dt.21.1.2016 (Annexure-21) and direct the Opp. Parties to regularize the service of the Petitioner from 14.7.2003 to 24.7.2007 and to further direct the Opp. Parties to release the arrear salary along with all up-to-date consequential service benefits to the Petitioner within a stipulated time."

2. Briefly stated, the facts of the case are that the Petitioner joined as an Asst. Teacher on 1st June, 1989 in Madan Mohan Jew Sanskrit Vidyalaya, which is an Aided Educational Institution. She served as such continuously till 12th July,

2003. On 14th July, 2003 the Head Pandit of the Institution did not allow her to sign in the Attendance Register and to take classes for which, the Petitioner submitted representation on 17th July, 2003 to the Superintendent of Sanskrit Studies, Puri, Odisha (Opposite Party No.3) with copy to the District Education Officer, Jajpur (Opposite Party No.4) While the matter stood thus, the Head Pandit by letter dated 23rd August, 2003 asked the Petitioner to give reasons for her absence. This was followed by a spate of correspondence between them with the Petitioner claiming that she was not allowed to sign on the Attendance Register while the Head Pandit taking the stand that she had remained unauthorizedly absent. After several correspondences, which yielded no result, the Petitioner submitted a representation on 21st June, 2006 to the Principal Secretary to Government in School and Mass Education Department for redressal of her grievance. Pursuant to such representation, the Director of Secondary Education directed the Petitioner and the Head Pandit to be present on 5th July, 2006, but while the Petitioner appeared, the Head Pandit did not. An attempt was made to ensure joining of the Petitioner by the Director of Secondary Education by deputing the Administrative-cum-Accounts Officer of the office of District Education Office in his presence. The Petitioner submitted her joining report on 20th July, 2006, but the same was not accepted by the Head Pandit. Ultimately, the Petitioner was allowed to join in the School on 25th July, 2007. She thereafter made several representations for regularization of her aforementioned period and payment of salary for the same i.e. from 14th July, 2003 to 25th July, 2007, but to no avail. Ultimately, the Director vide order dated 27th December, 2013 constituted a five member sub-committee for inquiry. The Sub-committee enquired into the matter, but was not convinced that the Petitioner had rendered her duty during the relevant period and recommended that the said period be decided as leave due admissible to regularize her period of absence. The Director however, did not accept the inquiry report and directed a re-inquiry to be conducted. However, in his letter dtd.21st January, 2016 the Director wrote to the Petitioner stating that she was unable to produce the required documents in support of her continuance in the School for the relevant period and therefore, no further inquiry was required to be taken up at that stage.

3. Despite sufficient notice, no counter affidavit was filed by the Opposite Party-authorities.

4. Heard Mr. Karunakar Jena, learned counsel for the Petitioner, and Mr. S.N.Pattnaik, learned Addl. Government Advocate for the State.

5. Mr. Jena would contend that the Writ Petition deserves to be allowed by following the doctrine of non-traverse inasmuch as the averments of the Writ Petition have not been answered at all which amounts to implied admission. Mr. Jena has cited the decision of the Apex Court in the case of Lohia Properties (P) Ltd. vs. Atmaram Kumar; (1993) 4 SCC 6 and of this Court in the case of Pratap Kumar Jena vs. Government of Odisha and others; 2017(1) OLR-222. Mr. Jena would further contend that the Petitioner having been wrongfully prevented from

signing in the Attendance Register despite performing duties, is entitled to the salary for the said period. Further, the period in question needs to be regularized as otherwise it would amount to a break in her service.

6. Per contra, Mr. S.N.Pattnaik, despite absence of a counter affidavit, submits on the basis of the available pleadings that it was never conclusively proved that the Petitioner had rendered service to the Institution during the relevant period. Moreover, if she was not allowed to sign in the Attendance Register, it was a case of termination of employment which she could have challenged before the appropriate forum. Since she had not done so at the relevant time, she cannot be permitted to raise any grievance at this belated stage.

7. After carefully perusing the averments of the Writ Petition, this Court finds that the documents enclosed thereto do not provide conclusive evidence as to if the Petitioner had been prevented by the Head Pandit from signing in the Attendance Register, or had performed her duties nevertheless. Further, whether she had remained unauthorizedly absent is also not conclusively proved. If the Petitioner's contention is accepted in toto, it would be a case of refusal of employment by the Head Pandit, which in turn would amount to termination of service. Such termination of service without approval of the Director would be illegal and could have been challenged before the State Education Tribunal by filing appropriate application. In the case of *Dhaneswar Nayak vs. State of Odisha and Ors.*; 1986 (II) OLR 113 as followed in several cases including the case of *Bhairab Kumar Biswal vs. State of Odisha and others*; 2023 SCC OnLine Ori 2297, this Court held that refusal of employment amounts to termination of service.

8. Nevertheless, this Court finds that a contrary stand was taken by the Head Pandit that the Petitioner had remained absent from her duty unauthorizedly. The inquiry conducted by the Sub-committee proved to be inconclusive. Thus, it becomes evident that the Writ Petition involves seriously disputed questions of fact as there is no way by which this Court can come to a definite finding either that the Petitioner was refused employment or she had remained unauthorizedly absent. Obviously, the doctrine of non-traverse as invoked by the learned counsel for the Petitioner by citing the aforementioned decisions would not apply where the facts itself are not clear or conclusive.

9. Be that as it may, fact remains that the Petitioner was allowed to join ultimately on 25th July, 2007. Had it been a case of voluntary absence, the Petitioner obviously would not have taken the trouble of submitting multiple representations to different authorities. So even if voluntary absence from duties can be ruled out, there is still no evidence of the Petitioner rendering any work to the Institution during the relevant period. The claim of the Petitioner for salary would thus be hit by principle of 'no work no pay'. Nonetheless, the period in question i.e. from 14th July, 2003 to 24th July, 2007 has to be regularized as it would adversely affect her service career. The Sub-committee had recommended to treat the period as leave due admissible, but in view of the peculiar facts

obtaining in the case, this Court is of the view that the same would be harsh and unjustified. On the contrary, ends of justice would be served if the period in question is notionally treated as on duty.

10. For the foregoing reasons therefore, the Writ Petition is allowed in part. While holding that the Petitioner shall not be entitled to salary for the period from 14th July, 2003 to 24th July, 2007, this Court directs the Opposite Party-authorities to pass necessary orders to treat the said period as on duty notionally, so that her continuity in service is not adversely affected.

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