

(2012) 07 JH CK 0229
In the Jharkhand High Court
Case No : L.P.A. No. 256 of 2012

State of Jharkhand and Another

APPELLANT

Vs

Rohit Mukhi and Others

RESPONDENT

Date of Decision : 30-07-2012

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2013) LabIC 168

Hon'ble Judges : Prakash Tatia, C.J.;Jaya Roy, J

Bench : Division Bench

Advocate : S.K. Verma, S.C., I.B. Shastri, J.C. to S.C.I., Ms. A.R. Choudhary, for the Appellant; R. Satender, J.C. to G.A., for the Respondent

Final Decision : Dismissed

Judgement

1. The appellant State has preferred L.P.A. No. 256/2012 against the judgment given by the learned single Judge in W.P. (S) No. 4326/2007 dated 27th April, 2012, whereby learned single Judge allowed the writ petition of the petitioner, holding that as the petitioner's resignation, which was submitted on 6.2.1993, has not been accepted by the respondent-Department at any point of time, the petitioner can be treated to be in service. In view of the above, learned single Judge directed the respondent-authority to allow the petitioner to join the service. So far as payment of arrears of salary during the intervening period, i.e., from 6.2.1993 onwards, is concerned, it has been held that the same cannot be paid to the petitioner on the basis of "No work, no pay" principle and therefore, the petitioner is not entitled to backwages. It is also declared that the petitioner is entitled to have the benefits notionally, on account which he be given the permissible benefits notionally by treating intervening period as continuity of service for all other purposes. The above judgment has been challenged by the writ petitioner by preferring L.P.A. No. 228/2012, wherein it has been said that the petitioner was entitled to backwages at least from the date when he offered his joining, i.e., 16.7.2004 and the petitioner was not allowed to join the service

by the respondents.

2. The State also has challenged the above judgment in L.P.A. No. 256/2012. Learned counsel for the appellant State submitted that the impugned judgment deserves to be set aside in view of the fact that, admittedly the writ petitioner himself submitted resignation letter on 6.2.1993 and did not turn up for service for a very long period of 14 years and in the year 2007, he gave legal notice through his counsel and that too not for joining the duties but for other benefits because of his past service rendered prior to resignation. Thereafter petitioner filed writ petition to claim which was not in existence. However, in reply it was submitted that since the petitioner remained absent from duty without leave for more than 5 years, the service automatically stood terminated.

3. Learned counsel for the writ petitioner vehemently submitted that earlier there was Rule 76 in Bihar Service Code, 1952, wherein it was provided that in a case, an employee remains absent from duty for more than 5 years, his service shall be deemed to have been terminated. However, that provision was struck down and thereafter clause (b) was inserted under rule 76 providing that in such circumstance of long absence, the Department may hold a departmental proceeding and may terminate the service of the employee. It is submitted, therefore, service of the employee can be terminated only by way of holding departmental proceeding even on the ground of unauthorized absence beyond the period of more than 5 years. Learned counsel for the writ petitioner submitted that the Division Benches of Patna High Court in the case of Smt. Pravabati Sengupta v. The State of Bihar & Ors. reported in 1989 PLJR 485 and in another case of Sidhnath Upadhya v. The State of Bihar & Ors. reported in 1991 (2) PLJR 148 have considered similar cases, like the case in hand and in both the cases, the Division Benches held that even in a case where the employee remained absent for 5 years and 10 years or even more, then also their services can be terminated only by following the procedures established by law, i.e., by holding a departmental proceeding. In both those cases, it has been held that such an employee, who remained absent for such a long period, shall be deemed to be in service and direction was issued to the employer to accept the employees in service. Consequential benefits were also granted, may there be denial of backwages. In view of the above, learned single Judge rightly held that since the petitioner's resignation was never accepted, he is in service and is entitled to the benefit of continuity of service. However, learned single Judge did not grant backwages from 16.7.2004, the date on which the petitioner reported for duty after his long absence.

4. We considered the submissions of the learned counsel for the parties and perused the facts of the case.

5. It is clear from the Article 311 of the Constitution of India itself that no person, who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was

appointed and such employee cannot be dismissed or removed or even cannot be punished unless he is given a reasonable opportunity of being heard in respect of any of the charges which may be levelled against him. Therefore, the service of the employees in the service of the State and connected therewith are protected by Constitution in certain cases and by law in some of the cases. It is true that an employee can be removed from service only in accordance with the rules applicable to his service and an employee can be punished and order of punishment can be dismissal, removal or termination of service, but so far as all those issues, like removal, termination and dismissal of service or any punishment are concerned, certain departmental proceedings are required to be taken before passing such order, without which such order cannot be sustained by Court. However, this is the protection given to the employee against the action of the employer.

6. The question, which is under consideration before us, is whether the employee can abandon the service or not? This question arises from the admitted facts as admitted by the writ petitioner himself that he himself submitted resignation on 6.2.1993 and case of the employee is that, his resignation was not accepted even after persuasion of petitioner. From the averments made in the writ petition as well as in the alleged letters, copies of which have been placed on record, it appears that the petitioner was more interested in seeing that his resignation be accepted and he may be given consequential benefits. According to the petitioner himself, after submitting resignation he did not join the duty, nor he was asked to join the duty, nor he was denied to join the duty for 14 years, thereafter he contacted an Advocate and even after contacting the Advocate and after obtaining legal advice, he served a notice on 21st May, 2007 (Annexure - 3 to this appeal), wherein he admitted that he submitted his resignation and further admitted the fact of his going to his office several times just to enquire whether his resignation has been accepted or not. The relief he has claimed in the notice is that he be informed as to whether his service has been terminated or not and his entire due amount may be ordered to be paid within a period of one month. Therefore, the notice also indicated that petitioner's case, after submitting his resignation, was that he may be given benefits for his rendered service, prior to resignation only. Not only this, in earlier letters also, copies of which have been placed on record by the State along with this appeal, it is indicated that the petitioner wanted to take the benefit of his past service till he resigned.

7. After submitting resignation, petitioner's own claim, till he filed writ petition, for 14 years was not for joining the duties in service but was only for monetary benefit. Then all of a sudden, after abandoning service, petitioner sought relief of joining service which he himself abandoned 14 years ago. Therefore, it was not the case of termination, removal or dismissal of the employee, as no such order was passed by the employer in present case. It was, in fact, a case of abandonment of service by the employee and that has not been appreciated, and therefore, not considered by the learned single Judge. We may again reiterate that protection available to employee is against the illegal action of employer and

this does not mean that when employee himself abandoned his claim voluntarily, then he is prevented from abandoning his right or claim. It is true that in a case of unauthorized leave for a long period or even for a shorter period, the Department may initiate departmental proceedings but when the employee himself resigned from the service and thereafter did not attend the duties and by conduct he has shown that he has no intention to serve the duties and he wanted the benefit of his past service by getting retirement benefits due to his rendering requisite period of service, then in that situation it can be a case of abandonment of service by the employee. Whether it is an abandonment of service or otherwise is a question of inference to be drawn from the totality of the facts of the case. In this case, learned counsel for the writ petitioner has submitted that the State has not taken the plea of abandonment of service by the employee. It may be true but that will not make much difference, in view of the admission of the writ petitioner himself that he wanted to leave the job and for that purpose, he submitted resignation and thereafter he tried to get only the information with respect to acceptance of his resignation, which is clear from the voluminous evidence as well as from the legal notice served by the employee through Advocate. Therefore, this is a pure question of law and this Court examined this aspect of the matter; otherwise the petitioner's writ petition was liable to be dismissed on the ground of inordinate delay of 14 years and laches on the part of the petitioner.

8. Learned counsel for the writ petitioner relied upon the aforesaid two Division Bench judgments of the Patna High Court, which deal with the matter where the employee reported for duty after a delay of 10 or more years and the State wanted to say that such employee's service stood terminated by virtue of operation of Rule 76 of the Bihar Service Code, whereas that provision was found to be unconstitutional and therefore, in that situation, the Court declared that the employee is in service. Apart from the above, in both the cases, it was never the case of the employee that he wanted to leave the job and in none of the above cases, resignation was submitted by the employee. In those cases, employee may have got the benefit of technicalities of law. Thus, we are of the considered opinion that in a case when service benefits are sought to be taken away by the employer of an employee, then that can be taken away only in accordance with law and by following the procedures and by inflicting punishment after due departmental proceedings. But when the employee himself wants to leave and abandon the job and wants to become free subsequently after a decade, in that situation any relief to such employee by permitting him to join the service will certainly be nothing but abuse of the process of Court due to the mere technicalities of law and in Government employment, it will result into unnecessary burden upon the State Exchequer and will give undue advantage to the wrong doer. In writ jurisdiction, the Court is required to see that the relief be granted only to those persons who come with clean hands and are seeking relief, which is just under equitable jurisdiction. Simply because one is the State employee, the only protection, which has been given, is against wrongful act of

the employer and it cannot be extended to mean that the employee has such a great liberty of doing the service at his choice and can well be in service at any time, may it be after decades, and he may wait for his age of superannuation and may ask for all service and retirement benefits.

9. We are making it clear that the above issue of abandonment of service has been decided in the light of the peculiar facts and circumstances of this case and it may not be confused with the cases of misconduct of wilful absence from duty of employee. This decision may not be interpreted to mean that any employee has right to remain absent from duty without obtaining leave or has right to submit resignation and treat it as end of his service and end of relationship of employee and employer to avoid punishment for misconduct or leaving the job where employee cannot leave the job without permission of employer etc. In peculiar facts and circumstances of case, the inference of abandonment of service by the employee can be drawn and this plea can be taken by the employer in peculiar facts and circumstances, which are required to be decided according to the facts of each case. The plea of abandonment of service may not be available to the employee so as to take advantage of his own wrong and to avoid disciplinary action by the employer. In case of absence from duty without leave and permission may entail the employee for punishment in departmental enquiry and that right of the employer of taking action against such delinquent employee remains as it is and the employer can initiate departmental proceeding, but where the Department has not initiated any departmental proceeding, in defence, the employer can take the plea of abandonment of service by the employee. At the cost of repetition, we may mention that the plea of abandonment of service may not be available to the employee so as to give a benefit of wrong to the wrong doer.

10. In view of the above reasons, we are of the considered view that it is a case of abandonment of service and in view of the letters and legal notice of the petitioner, he at the most could have sought the relief of passing appropriate order by the respondents with respect to acceptance of his resignation. He had no intention to serve the duties; thus, he is not entitled to claim the service. Therefore, we are of the considered opinion that the judgments referred above as well as judgment referred in the impugned judgment have no application to the facts of the case, particularly because of the reason that in the present case, the petitioner himself submitted his resignation and abandoned the service voluntarily, knowing well its consequence. Therefore, the impugned judgment dated 27.4.2012 deserves to be set aside.

11. So far as dues are concerned, the petitioner was, in fact, seeking relief from the respondent-State with respect to the consequential benefits due to his rendering service till 6.2.1993, i.e., regarding payment of gratuity or any other benefit like pension if he rendered pensionable service. These benefits cannot be denied even on the ground of delay in filing the writ petition.

12. Therefore, L.P.A. No. 256/2012 preferred by the State is allowed in part and

it is held that the employee-writ petitioner abandoned the service in 1993. In addition to the above, it is also held that the employee shall be entitled to the benefits of his service which he rendered from 15.12.1978 to 6.2.1993 and if he has rendered pensionable service, he will be entitled to pension only in accordance with law which was applicable on 6.2.1993. The petitioner will also be entitled to other benefits like gratuity, GPF etc. which were applicable to the employee at the relevant time. The amount due may be calculated within three months and if any amount is due to the employee, that may be paid to him within three months thereafter. In view of the reasons stated above, L.P.A. No. 228/2012 preferred by the employee-writ petitioner is dismissed.