

(2016) 04 OHC CK 0026

In the Orissa High Court

Case No : Writ Petition (Civil) No. 12139 of 2012

Susama Rath

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 21-04-2016

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (2016) 122 CutLT 754 : (2016) 1 ILRCuttack 1093

Hon'ble Judges : Indrajit Mahanty and Dr. D.P. Choudhury, JJ.

Bench : Division Bench

Advocate : M/s. R.N. Nayak & K.K. Sahoo, Advocates, for the Petitioner; Mr. B. Bhuyan, Additional Govt. Advocate, for the Petitioners

Final Decision : Disposed Off

Judgement

Dr. D.P. Choudhury, J.—Challenge has been made to the inaction of the opposite parties for not considering the case of the petitioner under The Orissa Civil Service (Rehabilitation Assistance) Rules, 1990 (hereinafter called "the Rules") and not making payment of arrear dues and death benefit of her late husband.

FACTS

2. The factual matrix leading to the case of the petitioner is that the husband of the petitioner was serving as P.T.S.-cum-Night Watcher in the Government Homoeopathy Dispensary, Paralakhemundi, in the district of Gajapati on temporary basis on payment of wage of Rs. 930/- per month since 16.8.2000. While working as such the husband of the petitioner suffered from Cancer and admitted in the Acharya Harihara Regional Cancer Centre, Cuttack on 9.12.2009. Later he was referred to Tata Memorial Cancer Centre. After being little recovery he was discharged but on 6.2.2010 he died at Paralakhemundi.

3. It is the further case of the petitioner that after death of her late husband, petitioner obtained the Legal Heir Certificate and approached the opposite party

No.1 for giving her employment under compassionate ground vide the Rules. The opposite party No.1 directed the Inspector of Homoeopathy, Berhampur to give the job to the petitioner. But the Inspector did not comply with the same. So, the petitioner has to approach the Orissa Administrative Tribunal stating that her husband was Government servant and as such she is entitled to get the benefit under the Rules, 1990. But the Tribunal rejected the claim of the petitioner stating that her husband was not holding the civil post for which she is not entitled to get any death benefits and also the petitioner is not entitled to get any employment on compassionate ground under the Rules. Challenging such order, the present writ petition has been filed by the petitioner.

SUBMISSIONS

4. Learned counsel for the petitioner submitted that the order of the Tribunal is illegal, improper and liable to be set aside inasmuch as the Tribunal has not considered the fact of the case properly. According to him The Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 states that a Government servant means a person who is a member of a service or who holds a civil post under the State and includes only such persons who are temporarily placed at the disposal of the Union Government or any other State Government or a local authority. He further stated that in the case of *State of Assam and others v. Kanak Chandra Dutta*, reported in AIR 1967 SC 884, a person in the employment of Government should be deemed to hold a civil post. It is submitted on behalf of the petitioner that the learned Tribunal has erred in law by not considering the definition of civil post and the Tribunal ought to have held in the facts and circumstances of the case that the husband of the petitioner having served for nine years as P.T.S.-cum-Night Watcher was a regular employee holding the civil post. Learned Tribunal should have considered the case of the petitioner on compassionate ground because petitioner being widow of the late employee suffers from distress and financial crunch without having got any benefit under the Rules. Learned Tribunal should have directed the opposite parties to clear the arrear dues of the late husband of the petitioner and to allow the petitioner to join the job in place of her late husband when the opposite party No.1 has categorically directed the Inspector of Homoeopathy to engage the petitioner in the post held by her late husband. So, he submitted the petitioner's fundamental right under Article 14 has been grossly violated for which the impugned order of the Tribunal is liable to be set aside with further direction to allow the petitioner to get employment by the opposite parties and to disburse the arrear dues of her late husband as soon as possible.

5. Learned Additional Government Advocate appearing for the State Government submitted that the order of engagement of the husband of the petitioner clearly shows that her husband Binod Kumar Rath was engaged as P.T.S.-cum-Night Watcher temporarily without having substantive right over the post. He also submitted that since the petitioner's husband was a temporary employee he cannot be deemed to have held any civil post and as such the Tribunal was right

of its perception to observe that the petitioner's husband was not holding any civil post and as such the reliefs claimed by the petitioner cannot be made available to the petitioner. He submitted that the petitioner's husband being a temporary employee engaged on daily payment basis, no right accrues to the concerned deceased employee to receive any death benefit and as such the compassionate ground under the Rules cannot be extended to the petitioner even if petitioner is unable to maintain her livelihood. He submitted to affirm the order of the Tribunal and dismiss the writ petition.

6. The point for consideration:-

(i) Whether the impugned order suffers from illegality and impropriety and is liable to be set aside.

DISCUSSIONS

POINT NO.(i) :

7. It is admitted fact that the husband of the petitioner was engaged as P.T.S.-cum-Night Watcher in the Government Homoeopathy Dispensary, Paralakhemundi, in the district of Gajapati on payment of wages of Rs. 930/- per month. It is not disputed that Binod Kumar Rath, the husband of the petitioner was admitted in the Acharya Harihara Regional Cancer Centre, Cuttack on 9.12.2009 vide Annexure-4 and it is not disputed that he was treated in Tata Memorial Cancer Centre and being discharged from that place came to village and finally expired out of Cancer on 6.2.2010. It is also admitted fact that the Tahasildar, Paralakhemundi has issued Legal Heir Certificate showing the present petitioner as widow wife and one Sibani Kumari Rath, daughter of late Binod Kumar Rath. It is also not disputed that the petitioner had applied to the Commissioner-cum-Secretary, Government of Odisha and Director of Health & Family Welfare Department, Bhubaneswar for appointing her at Paralakhemundi Homoeopathy Dispensary on compassionate ground under relevant rules.

8. The relevant portion of the impugned order is extracted below for better appreciation:

"Considering the submissions made by the learned counsel for both the parties, I am of the considered view that since the applicant's husband was not a regular Govt. servant being appointed through regular selection process and was only engaged on a monthly wage of Rs. 930/- per month, even though he was engaged as such for 8 to 9 years, he cannot be treated as a holder of civil post and as such I am not inclined to entertain the prayer as has been made by the applicant, relating to her appointment under the Rehabilitation Assistance Rules and also for payment of leave salary for Jan. and Feb. 2010".

From the aforesaid order it is clear that the learned Tribunal has not accepted the claim of the petitioner inasmuch as her husband was not a holder of the civil post being temporary employee. Now the question arises whether the petitioner's husband was holder of the civil post. In the case of State of Assam and others v.

Kanak Chandra Dutta, reported in AIR 1967 SC 884, where Their Lordships observed the following paragraphs:-

"(9) The question is whether a Mauzadar is a person holding a civil post under the State within Article 311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Article 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or a State, See marginal note to Article 311. In Article 311, a member of a civil service of the Union or an all-India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding post under a State is a person serving or employed under the State, See the marginal notes to Articles 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the state and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post.

(10) In the context of Articles 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, See Article 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasizes the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post.

(11) Judged in this light, a Mauzadar in the Assam Valley is the holder of a civil post under the State. The State has the power and the right to select and appoint a Mauzadar and the power to suspend and dismiss him. He is a subordinate public servant working under the supervision and control of the Deputy Commissioner. He receives by way of remuneration a commission on his

collections and sometimes a salary. There is a relationship of master and servant between the State and him. He holds an office on the revenue side of the administration to which specific and onerous duties in collection with the affairs of the State are attached, an office which falls vacant on the death or removal of the incumbent and which is filled up by successive appointments. He is a responsible officer exercising delegated powers of Government. Mauzadars in the Assam Valley are appointed Revenue Officers and ex officio Assistant Settlement Officers. Originally, a Mauzadar may have been a revenue farmer and an independent contractor. But having regard to the existing system of his recruitment, employment and functions, he is a servant and a holder of a civil post under the State."

9. With due respect, it is revealed from the aforesaid decision that the Mauzadar who is engaged as a Revenue Contractor in Assam under Assam Land Revenue Manual is the holder of the civil post. Their Lordships have aptly observed that relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post. Also Their Lordships were pleased to observe that a post is a employment but every employment is not a post and the casual labourer is not a holder of the post. So, a post under the State means post under the administrative control of the State. Since the Mouzadar is a subordinate public servant working under the supervision and control of the Deputy Commissioner and receives remuneration a commission on his collections and sometimes a salary he is holder of a civil post under the State.

10. There is another decision of the Hon"ble Apex Court in the case of Dr. (Mrs.) Gurjeewan Garewal v. Dr. (Mrs.) Sumitra Dash and others, reported in AIR 2004 SC 2530 where Their Lordships observed as follows:-

"13. In State of Assam v. Kanak Chandra it was also held that "a post is an employment but every employment is not a post." While dealing with the termination of an employee, another Constitution Bench of this Court looked into the applicability of Article 311 in S.L. Agarwal v. General Manager, Hindustan Steel Ltd. (1970) 1 SCC 177. Here this Court held that job in Hindustan Steel is not a "civil post" so as to claim the protection of Article 311. Another issue noted by the Court in Hindustan Steel is nature of independent existence of Hindustan Steel Company. Considering this and other aspects it is ruled that Hindustan Steel Company is not a State of the purpose of Article 311.

14. Reverting back to the case in hand, Section 4 of The Post Graduate Institute of Medical Education & Research, Chandigarh Act, 1966 [PGIMER Act] says that PGIMER is a "body corporate which is having a perpetual succession and a common seal with power." This clearly provides that PIGMER is a separate entity in itself. Admittedly the employees of any authority which is a legal entity separate from the State, cannot claim to be holders of civil posts under the State in order to attract the protection of Article 311. There is also no master and

servant relationship between the State and an employee of PGIMER, which is a separate legal entity in itself. It is a settled position that a person cannot be said to have a status of holding a "civil post" under State merely because his salary is paid from the State fund or that the State exercises a certain amount of control over the post. The PGIMER Act might have 10 provided for some control over the institution but this doesn't mean that the same is a State for the purpose of Article 311. Therefore the employees of PGIMER cannot avail the protection of Article 311 since the same can be claimed only by the members of a civil service of the Union or of All India Service or of a civil service of a State or by persons who hold a civil post under the Union or a State. PGIMER cannot be treated as a "State" for the purpose of Article 311 and the employees therein are not holding any "civil post". In result, the 1st Respondent is not holding a "civil post" and she cannot claim the guard of Article 311".

11. With due respect, it is found that the said decision has followed the decision of AIR 1967 SC 884 (supra) as to the principle underneath the definition of civil post. In the aforesaid decision Their Lordships did not accept the Post-Graduate Institute of Medical Education and Research (in short "PGIMER"), Chandigarh as Government but accepted the same to be a body incorporate as per the definition in legislation relating to PGIMER and the doctor appointed therein cannot be said to have held the civil post in accordance with Article 311 of the Constitution.

12. From the aforesaid discussion, we are of the view that for determining a post to be civil post it must be considered that the said post is created by the State but not by any body corporate. It is also clear that whether that post is temporary or permanent is immaterial but certainly it cannot be a casual one. Moreover, it is clear from the aforesaid decisions of the Hon'ble Apex Court that the post whether civil post or not should be determined according to the concerned fact and circumstances of the case.

13. In the case in hand, the original appointment letter vide Annexure-1 speaks in following manner:-

"Sri Binoda Kumar Rath an outsider is hereby engaged as P.T.S.-cum-Night Watcher of the Govt. Homeo Dispensary, Parlakhemundi, Dist. Gajapati on the payment of wages @ of Rs. 930/- p.m. (Rupees nine hundred thirty) only as fixed up by Govt. from the date of his joining at Govt. Homeo Dispensary, Parlakhemundi.

His engagement is purely temporary and may be terminated at any time without assigning any reason thereof".

From the letter itself it is clear that the husband of the petitioner was engaged as P.T.S.-cum-Night Watcher on payment of consolidated wages of Rs. 930/- per month as fixed by the Government from time to time and he was not a casual labourer although his service was temporary without defining the tenure. So, the engagement of the husband of the petitioner on monthly basis as fixed by

Government from time to time without any sort of break between any period prima facie shows that he was appointed against regular vacancy. This observation finds support from Annexure-3 where under the Under Secretary to Government has written to the Director of the Indian Medicine Homoeopathy on 23.3.2009 to send the list of all the P.T.S.-cum-Night Watchmen for their selection for appointment to the post of Class-IV employees in the office. Had there been casual labourer or daily wager, the question of their appointment by selection to Class-IV Grade would not have come up. Moreover, it is admitted fact that the late husband of the petitioner worked for nine years uninterruptedly till his death. Had there been any decision taken by the Government to treat him as a casual labourer, he would not have been allowed to continue for eight to nine years continuously till his death on payment of regular wages per month.

14. Moreover, learned counsel for the petitioner also drew our attention to Annexure-9 where under on the application of petitioner the Director of Health & Family Welfare Department, Bhubaneswar asked the Inspector of Homoeopathy, Berhampur to consider the case of the petitioner as her husband was working as P.T.S.-cum-Night Watchman. So, from the above facts and discussion, we are of the considered view that petitioner was holder of the civil post on being paid remuneration by the State Government.

15. When the husband of the petitioner was a holder of the civil post receiving the remuneration, he was holder of a civil post under Article 310 read with 311 of the Constitution of India. Thus, the Tribunal fell in error by not understanding the factual aspect and illegally rejected the claim of the petitioner, we are of the considered view that the observation of the Tribunal being de hors to principles of law is liable to be set aside. Thus, the contention of the learned Additional Government Advocate is untenable wherein there is force with submission of the learned counsel for petitioner. Point for determination is answered accordingly.

CONCLUSION

16. When an employee is engaged for long nine years without being disrupted being holder of civil post, his wife has got legitimate right to claim to step into shoes of her late husband. Apart from this, according to Rehabilitation Assistance Rules, 1990, there is no reason to disqualify her when her husband was holding a civil post. So, the duty of the opposite party No.3 was to comply with the order of the opposite party No.2 mentioned in the representation of the petitioner. Be that as it may, we are of the view that because of the continuance of the petitioner for quite long nine years uninterruptedly, Annexure-1 does not give rise to array him as casual labourer and there is no bar for giving engagement to the petitioner who is the dependant family member of the late deceased employee, the petitioner is entitled to relief for engagement as Watchman in place of her late husband with the contractual salary or any other Group-D post as per the norms of the State Government. Further it is also the prayer of the petitioner to sanction the leave salary of her late husband and the death benefits. Since sufficient materials for pursuing such contention are not available

and the period of his leave is not clear from the facts produced before the Court, we are unable to consider the availability of the leave salary to the husband of the petitioner. So, the impugned order dated 17.2.2011 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.162 of 2011 is liable to be quashed to the extent as observed by us herein above and we do so accordingly.

17. We further direct that opposite parties shall appoint the petitioner on compassionate ground under the Rules on contractual basis in the post held by her late husband or in any other Group-D post within a period of three months and report compliance. The writ petition is disposed of accordingly.