

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14774 of 2005

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Sunil Kumar Jha, age 50 years, son of late Baleshwar jha, resident of New Area Garhpar, P.S. Nawadah, District – Nawadah.

.... Petitioner/s

Versus

1. The Chairman cum Managing Director, The New India Assurance Company Ltd, having its Head Office at 87 Mahatma Gandhi, Fort, Mumbai – 400001.
2. The General Manager, The New India Assurance Company Ltd, having its Head Office at Mahatma Gandhi Road, Fort, Mumbai-400001.
3. The Assistant General Manager, The New India Assurance Company Ltd, having its Head Office at 87 Mahatma Gandhi Road, Fort, Mumbai-400001.
4. The Regional Manager, Patna Region of the New India Assurance Company Ltd, B.S.F.C. Building, Fraser Road, Patna-1
5. The Divisional Manager, The New India Assurance Company Ltd. Nagmatia Road, Gaya.
6. The Branch Manager, The New India Assurance Company Ltd. Ranchi Road, Biharsharif, P.S. Biharsharif, District Nalanda.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. L.N. Das, Advocate

For the Respondent/s : Mr. R.K.P. Singh, Advocate
Mr. Bal Bhushan Choudhary, Advocate

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CORAM: HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

Date: 05-07-2018

Heard learned counsel for the petitioner and the respondent Bank.

2. At the very outset counsel for respondent has raised a preliminary objection regarding maintainability of the instant writ petition. Submission is that the prayer made by the petitioner is barred in as much as the prayer made in the writ petition has been concluded



in the proceedings arising out of C.W.J.C No. 9135 of 2003.

3. Having considered the said submissions on behalf of the respondent company this Court has seen the order dated 03.03.2005 passed in the C.W.J.C. No. 9135 of 2003. The petitioner in course of the said proceeding, had prayed for disposal of his appeal pending against the punishment of censure imposed upon him by order dated 31.12.1997. The writ petition was thus, disposed off with a direction to the Regional Manager of the respondent company to dispose off the representation, pending before him within a period of three months. The petitioner's limited prayer in the said proceedings which has been recorded by this court is:-

“.....is that the appeal/representation of the petitioner against the order of “punishment” has not been disposed off.”

4. The other reliefs which have been prayed for in the instant writ petition was thus not even raised in the earlier writ petition and since the petitioner had challenged the order of punishment of censure by way of appeal/representation, the writ petition has been disposed off directing the respondent authority to consider the same.

5. One of the ingredients of principles of *res-judicata* is that the issue should be decided by the earlier order. From the order



dated 03.03.2005 it is apparent that there is no decision and in fact the issue has been left open to be decided by the Appellate Authority. The Appellate Authority had taken a decision on 16.09.2005. The same is annexure at 11 of the instant writ proceedings. Therefore, challenge to the order of punishment and other reliefs prayed for in the instant writ petition, in the opinion of this Court is not barred by principles of *res-judicata*. Having considered the preliminary objection, this Court would proceed to consider the petitioner's case on merits.

6. The brief facts giving rise to the instant case is that petitioner was appointed as an Inspector Grade 1 which is now Development Officer Grade 1 on 01.01.1983. The order of appointment is at annexure 1 and it contemplates probation period of 12 months with a Clause that the same is extendable for a further period of 12 months. The relevant Clause 3 of the appointment letter dated 13.12.1982 is as follows:

“Initially, you will be on probation for a period of 12 months which the company may at its discretion extend by a further period not exceeding 12 months.”

7. The appointment letter dated 13.12.1982 also



contemplates that a specific order was required to be issued confirming the petitioner's services after the probationary / extended probationary period. It also contemplates automatic termination of the petitioner's services after expiry of the extended probationary period. Petitioner's form for confirmation was forwarded by the authority on 27.12.1987. The confirmation form was forwarded by the petitioner's Branch Manager much after lapse of the probationary /extended probationary period which came to an end in January, 1985. The fact that the same has been forwarded by the Branch Manager of the Branch, is sufficient for this Court to come to opine is that the petitioner fulfilled the requirements fixed for confirmation of the services as contemplated under the order of appointment dated 13.12.1982.

8. One show cause dated 19.06.1986 came to be issued to the petitioner after three and half years of service. The same is annexed as annexure 3 to the instant writ proceedings. It is the charge memo dated 17.09.1991 which has given rise to the dispute between the parties. The said charge memo dated 17.09.1991 alleged that some cheques in respect of premium of policy holders deposited by the petitioner were dishonored. An allegation was made in the charge memo alleging certain incidents, that he acted in a manner



unbecoming of a public servant and was liable to be proceeded against. The final order pursuant to the charge memo dated 17.09.1991 came to be issued on 31.12.1997. The petitioner was awarded punishment of censure. Against the same the petitioner filed writ petition bearing CWJC No 9135 of 2003. The order of censure dated 31.12.1997 clearly shows that the same has been issued to the petitioner after conducting the proceedings under Rule 23-A of the General Insurance (Conduct, Discipline and Appeal) Rules 1975 (hereinafter referred to as 'the Conduct, Discipline and Appeal Rules') as amended from time to time.

9. Such proceedings under the Conduct, Discipline and Appeal Rules can be conducted against a confirmed employee. Obviously, the petitioner was treated as confirmed employee. Accordingly, the petitioner in the proceedings arising out of C.W.J.C. No. 9135 of 2003 has confined his relief to challenge the order of censure i.e., the punishment which was awarded to him under order dated 31.12.1997 issued by the competent authority of the respondent company. Thereafter, the appeal filed by the petitioner has been disposed off by order dated 16.09.2005. Petitioner's detailed appeal/representation which is annexures 8 and 9 of the writ petition has been disposed off by the Regional Manager of the respondent



company by order dated 16.09.2005 pursuant to the order dated 03.03.2005 passed in C.W.J.C. No. 9135 of 2003 in a most cryptic manner without assigning any reason. The findings of the Regional Manager in order dated 16.09.2005 reads as follows:

“That in light of the Hon’ble High Court’s order your Appeal/Representation has been duly considered and no new material facts have been brought out in your appeal necessitating revision of the Order given by the Competent Authority and thus the Order given by the Disciplinary Authority is confirmed and your appeal stands dismissed.”

10. Thereafter, the petitioner has filed the instant writ petition claiming various reliefs such as to regularize and confirm the petitioner’s service in the grade of Development Officer Grade-1 with effect from 1.1.1985 along with due and proportionate scale of pay and post, to give the petitioner benefit of Gazette notification No. 2(2) INS.III/02 dated 2.1.2003 and to allow the petitioner to opt for the post of Development Officer (Administration) as also to exonerate from the charges levelled against the petitioner by quashing the order-dated 31.12.97.

11. It is submitted by the counsel for the petitioner that



since his appeal has not been considered he has again reiterated the prayer for quashing of the order of punishment.

12. Having considered the submissions of the counsel for the petitioner and the respondent company, this Court does not find any occasions to interfere with the order of punishment dated 31.12.1997 imposing penalty of censure upon the petitioner. The order of the competent authority is after allowing the petitioner adequate opportunity to defend himself and after taking into consideration the various plea raised on behalf of the petitioner as well as the respondent company. Allegations levelled against the petitioner have been considered thoroughly. The conclusion of the Enquiry Officer dated 23.08.1994 have been duly considered by the Disciplinary Authority (Competent Authority). He has considered that minor punishment of censure is sufficient in relation to the allegations made against the petitioner. The order of censure is of 31.12.1997 and in view of the aforesaid consideration, this Court is not inclined to interfere with the award of punishment dated 31.12.1997.

13. Another fact is that during pendency of the instant writ proceedings the petitioner has attained the age of superannuation in January 2017. Just six days prior thereto he was served with a



show cause notice dated 29.12.2016. Paragraph 4 of the show cause dated 29.12.2016 which appears to be the only allegation for which the show cause has been issued is as follows:-

“4. Further it has been reported that you remain absent from your duty without informing in writing to your office for long period and/or without prior sanction of leave from the Competent Authority.”

14. The said issue in respect of which the show cause dated 29.12.2016 has been issued cannot constitute any allegation. Period/details of absence has not been specified nor communicated. The charge was not clear and specific. After issuance of show cause notice dated 29.12.2016, the petitioner was retired on 05.01.2017. When the said show cause notice was received by him on 12.01.2017 he submitted his objection to the show cause that the show cause issued on him is after retirement. He has specifically averred in his response that he has served the company for entire life and has retired on 05.01.2017 and till that day notice was not served or even dispatched to him.

15. By filing Interlocutory Application No. 990 of 2017, the petitioner has challenged the order dated 27.01.2017 whereby and



where under he has been communicated the decision of the Disciplinary Authority purporting to discharge/terminate the petitioner's service.

16. Apart from the fact that the said order has been dispatched and served upon the petitioner post retirement, the petitioner has also specifically stated that though he has been paid salary till December, 2016 the notice issued dated 29.12.2016 alleges that he was absent. The petitioner has specifically averred that the order of punishment on the basis of show cause notice dated 29.12.2016 does not disclose any allegation/charge. He submits that the period of absence has also not been disclosed in the show cause notice. Other than the fact that the order of dismissal/discharge could not be issued without subjecting the petitioner to a duly constituted enquiry and the fact that the order of termination / discharge suffers from merit, it is also submitted that the same could not have been done post retirement after the master servant relationship had snapped. On all these grounds the petitioner has assailed the order purporting to discharge/terminate the petitioner's services under annexure 14.

17. The prayer made in I.A. No. 990 of 2017 is resisted by the counsel for the respondent by submitting that a new case is



sought to be made out by the petitioner and as such the amendment should not be entertained.

18. Counter affidavit has been filed by the respondent company in response to the Interlocutory Application. In respect of the merits of the claim made by the petitioner they have relied upon averments made in the earlier counter affidavit. Since the order of termination dated 27.01.2017 has been issued during pendency of the instant writ petition which has been pending for hearing since 2005 and is an issue which is directly related to status of the petitioner's services which are already pending consideration before this Court in a proceeding arising out of C.W.J.C. No. 14774 of 2005, this Court would allow the prayer made in I.A. No 990 of 2017. The objection raised by the counsel for the respondent company is specifically overruled. Having allowed the I.A No. 990 of 2017, this Court is also of the opinion that the order of termination dated 27.01.2017 is unsustainable in law.

19. The order of termination has been issued only after issuing the show cause notice to the petitioner. Such show cause notice has been dispatched / communicated to the petitioner after his retirement. The effect of the same is that the petitioner ceased to be an employee of the respondent company. When the master servant



relationship has snapped the respondent company cannot exercise its authority to issue a show cause notice in respect of some stale and non est allegations, in relation to and during the course of petitioner's employment. The show cause notice on merits is also unsustainable in as much as the same is a vague show cause since it does not contain any details in respect of the alleged absence for which the petitioner is required to submit his response. Since details of alleged absence has not been given, this court would observe that the petitioner could not know as to for what period he is alleged to be absent. Unless period of absence is specified with reference to dates, alleged absence can neither be proved; nor denied.

20. Other than that this Court has also considered the fact that the order of termination has not been issued after allowing the petitioner adequate opportunity in a duly constituted proceedings in accordance with Conduct, Discipline and Appeal Rules of the respondent company. Hence the order of termination dated 27.01.2017 is quashed in as much as the same is without affording the petitioner any opportunity of hearing or to cross examine the witnesses.

21. Regarding the petitioner's status in the respondent company, this Court would only take notice of the fact that after lapse



of the probation/extended period of probation in January, 1985 there was a specific forwarding of the petitioner's confirmation form by the competent authority on 27.09.1985 for his confirmation and thereafter there is no specific order holding the petitioner to be not confirmed and in fact the respondent company has issued two charge memo on 17.09.1991 and 29.12.2016 i.e., six days prior to his retirement. The respondents have obviously considered the petitioner/confirmed employee for the entire service period.

22. The petitioner has relied upon the two judgments in the case of (1) *Om Prakash Mourya vs. U.P. Co-op. Sugar Factories Federation* reported in **1986 lab.I.C 1198**. The petitioner's reference to paragraphs 4 and 9 of the said judgment has been reproduced herein below :

“4. In the instant case the order of appointment promoting the appellant on the post of Commercial Officer merely indicated that his probationary period could be extended and he could be reverted to the post of Office Superintendent without any notice. Stipulation for extension of probationary period in the appointment order must be considered in accordance with the proviso to Regulation 17(1) which means that the probationary period could be extended for a period of one year more.



Undisputably on the expiry of the appellant's initial probationary period of one year, the appointing authority extended the same for another period of one year which also expired on 4.9.82. During the period of probation appellant's services were neither terminated nor was he reverted to his substantive post instead he was allowed to continue on the post of Commercial Officer. On the expiry of the maximum probationary period of two years, the appellant could not be deemed to continue on probation, instead he stood confirmed in the post by implication. The appellant acquired the status of a confirmed employee on the post of Commercial Officer and the appointing authority could not legally revert him to the lower post of Superintendent.”

9. In view of the above discussion it is manifestly clear that the appellant's services were regulated by the U.P. Co- operative Societies Employees Service Regulations, 1975. Since under those Regulations appellant's probationary period could not be extended beyond the maximum period of two years, he stood confirmed on the expiry of maximum probationary period and thereafter he could not be reverted to a lower post treating him on probation. The Order of reversion is illegal. We



accordingly allow the Appeal, set aside the order of the High Court and quash the order of reversion dt. 2.9.1983 and direct that the appellant shall be treated in service and paid his wages and other allowances. The appellant is entitled to his costs which is quantified as Rs. 1,000.”

23. The other judgment relied upon by the petitioner is in the case of *M.K. Agarwal v. Gurgaon Gramin Bank Ors.* reported in **AIR 1988 SC 286**. Petitioner has specifically relied upon paragraphs 4 and 5 of the said judgment which are as follows :

“4. The first point need not detain us. The period of the probation was one year, in the first instance. The employer could extend it only for a further period of six more months. The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in



the absence of express confirmation at the end of even the maximum permissible period of probation. In cases where, as here, these conditions coalesce, it has been held, there would be confirmation by implication. (See : State of Punjab v. Dharam Singh Om Prakash Maurya v. U.P. Cooperative Sugar Factories Federation Lucknow AIR 1986 SC 1844.”

24. On going through the two judgments of the Hon’ble Apex Court, this Court is also inclined to take the same view since in the instant case also his initial appointment was on 01.01.1983 on probation and with condition that the same would be extended for further period of 12 months. After lapse of probation/extended probation period, in January, 1985 confirmation form of the petitioner was sent by the Branch Manager for his confirmation and thereafter there is no specific order holding the petitioner to be not confirmed and in fact the respondent company has issued two charge memo during his service tenure, on 17.09.1991 and 29.12.2016 i.e., six days prior to his retirement. The respondents have obviously considered the petitioner/confirmed employee for the entire period of his service. It is a different thing that in the instant case they have taken stand that pursuant to lapse of the extended period of probation, the services of



the petitioner should be deemed to have been automatically terminated. Such submission of the respondent company cannot be accepted for the reasons indicated herein above. The petitioner has been in continuous employment of the respondent company since his appointment on 01.01.1983 till his retirement on 05.01.2017, and would be entitled to all consequential benefits.

25. The writ petition is therefore, allowed to the extent indicated herein above.

Prakash/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

(Madhuresh Prasad, J)

