

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 6523 of 2018

An application under Articles 226 & 227 of Constitution of India.

AFR **Narahari Swain** ----- **Petitioner**

-Versus-

State of Odisha & others **Opp. Parties**

Advocate(s) appeared in this case:-

For Petitioner : M/s. Sameer Kumar Das
S.K. Mishra & P.K. Behera,
Advocates

For Opp. Parties : Mr. R.N. Acharya,
Standing Counsel for School &
Mass Education Department.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
27th July, 2022

SASHIKANTA MISHRA, J.

The petitioner joined service as Headmaster of Nilakantheswar M.E. School on 31.03.1961. While working as such he suffered from depressive psychosis and remained under treatment from 01.07.1976

continuously. After his recovery, he became physically fit to discharge duties on 02.07.1981 and accordingly he wanted to resume his duties. But the Managing Committee of the School had by then posted another Headmaster in his place, for which the petitioner reported the matter to the District Inspector of Schools, Puri on 02.07.1981, who in turn directed the Managing Committee of the School to accept the joining report of the petitioner. However, no action whatsoever was taken by the Managing Committee on such instructions. In the meantime the School was taken over by the State Government in the year 1990-91 and renamed as Nilakantheswar Nodal U.P. School. While the matter stood thus the petitioner attained the age of superannuation on 13.10.1997 and as such, was due to retire from service w.e.f. 31.10.1997. The order of retirement was not issued by the opposite parties in favour of the petitioner. However, the petitioner submitted his pension papers with request to release his retirement benefits pending final decision on regularization of his service. The petitioner was regularly contributing to the contributory provident

fund and after the School was taken over by the State Government, to the Teachers Provident Fund and General Provident Fund. The petitioner had completed the qualifying period of service and was thus eligible to get pension. By letter dated 22.08.2008, the opposite party no.4 also directed the petitioner to furnish the necessary documents along with an affidavit, which the petitioner immediately complied. The opposite party no.4 again on 07.11.2008 asked the petitioner to submit further documents on the ground that no relevant records as per the petitioner's affidavit could be collected from the Headmaster of the School. According to the petitioner, he had submitted whatever documents were available with him. On the representation of the petitioner the opposite party no.2 by letter dated 09.04.2009 directed the opposite party no.4 to furnish the records/documents mentioned therein for consideration of the grievance of the petitioner. Being aggrieved by the inaction of the opposite parties in the matter of payment of pension, the petitioner approached the erstwhile Odisha Administrative Tribunal Cuttack Bench, Cuttack in O.A. No. 1507(C) of 2009,

which was transferred to the Principal Bench Bhubaneswar and renumbered as O.A. No. 1130 of 2013. The said O.A. was disposed of by the learned Tribunal by directing the Director to take a decision in the matter within a period of three months from the date of receipt of such order. Pursuant to such order, the opposite party no.4 submitted a factual report along with the service book of the petitioner to the Director for sanction of pension and other benefits vide letter dated 26.10.2017. On receipt of the report from the opposite party no.4, the Director vide Office Order dated 04.12.2017 rejected the claim of the petitioner for pension basically on the ground that he had abandoned the service and therefore was not entitled to any pension. It was further held that the petitioner was not coming within the term “retiring pension” under the Odisha Aided Educational Institutions’ Employees’ Retirement Benefit Rules, 1981 (in short “1981 Rules”) framed for the aided staff or the OCS (Pension) Rules, 1992 (in short “1992 Rules”). It is stated that the petitioner had never abandoned the service but only because of his illness he had remained absent for a long

period but even before such absence, the petitioner had already completed 15 years of service and is therefore, entitled to be paid pension. Thus, challenging the order dated 04.12.2017 (Annexure-10) passed by the Director, the petitioner has filed the present writ petition with prayer to direct the opposite parties to regularize his service and to release his pension and other retirement benefits.

2. A counter affidavit has been filed by the Director of Elementary Education (opposite party no.2). It is specifically stated in the said counter that the petitioner remained on medical leave from 01.07.1976 to 02.07.1981 i.e., for a period of 5 years and 2 days and that in support of such medical leave he had submitted a medical certificate issued by Dr. Bansidhar Ram on 02.07.1981 regarding his fitness to resume his duties. It is further stated that due to long absence of the petitioner in his duty the then Managing Committee of the School adjusted another teacher, namely, Sri Nanda Kishore Nayak against the post of Headmaster of the School without terminating the petitioner from service. It is further stated

that as per Rule-4 of 1981 Rules, the petitioner shall be entitled to pension only on the satisfaction of one among the five conditions mentioned therein. It is stated that the petitioner's case does not fulfill any of the said conditions as per the provision of Rule-4 of the 1981 Rules or Rules-5, 10 and 41 of the 1992 Rules. It is also submitted that the petitioner's absence from service or interruption of service has not been condoned as per Rule-36 of the 1992 Rules. Since the pension sanctioning authority, i.e. Block Education Officer of Nimapada or appointing authority cannot condone the break of service in favour of the petitioner as qualifying service counted towards pension from 01.07.1976 to 02.07.1981, i.e. the period of absence, he will not be eligible for pension. The period of absence as above requires regularization by the competent authority. Since the petitioner did not work in the School till the age of his superannuation he cannot be held to have retired on attaining the age of superannuation rather he must be held to have voluntarily abandoned the service. It is further stated that in view of the law laid down by the by the Supreme Court in the case of **Aligarh**

Muslim University and others vs. Mansoor Ali Khan

rendered on 28.08.2000, an employee who has abandoned his service is not entitled to pension.

3. Heard Mr. Sameer Kumar Das, learned counsel for the petitioner and Mr. R.N. Acharya, learned Standing Counsel for the School and Mass Education Department.

4. It is contended by Mr. Das that the petitioner having admittedly completed 15 years of uninterrupted service is entitled to pension since the qualifying service is 10 years. He further contends that his absence from service from 1976 to 1981 was for reasons beyond his control as he was suffering from a serious medical ailment. Even though he wanted to resume his duties after being medically fit, the authorities did not allow him to do so and instead, adjusted another person in his place despite the fact that he had not been terminated from service. Therefore, the petitioner's lien on his service had remained intact for all the years. The authorities, instead of regularizing the break period, did not take any action in the matter till the petitioner attained the age of

superannuation in 1997. Thus, the petitioner must be deemed to have been validly retired from government service and having rendered 15 years of service, must also be held to be entitled to pension as per the rules and therefore, the impugned order under Annexure-10 is bad in law.

5. Per contra, Mr. R.N. Acharya contends that it is a case of voluntary abandonment of service and the break period was never regularized by the competent authority prior to the age of his retirement. Such being the case, the petitioner is not entitled to pension as per the rules. It is further contended that a case of voluntary abandonment of employment can by no stretch of imagination be treated as retirement on attaining the age of superannuation so as to make him eligible to receive pension and other retirement dues. Therefore, according to Mr. Acharya, the order under Annexure-10 has been rightly passed.

6. From the rival pleadings and contentions put forth on behalf of the parties before this Court, it is evident that the fact that the petitioner joined in service

on 31.03.1961 and worked uninterruptedly till 01.07.1976 is not disputed. Further, the fact that the petitioner remained on leave from 01.07.1976 till 02.07.1981 is also not disputed. It is also not disputed that the petitioner did not actually resume duties thereafter though he submitted an application with such prayer accompanied by a certificate from the doctor regarding his medical fitness. In the counter affidavit filed by opposite party no.2 it is stated under paragraph-4 as follows:

“4. That, it is humbly submitted that the petitioner remained on medical leave from 01.07.76 to 02.07.81 i.e. for a period of 05 years and 02 days and in support of his medical leave Sri Swain had submitted a medical certificate issued by Dr. Bansidhar Ram, MBBS dtd:02.07.1981 regarding his fitness to resume his duties. But it is a fact that the original service book of Sri Swain is completely silent over the matter.”

From the above it is clear that even according to the opposite party no. 2, the petitioner was on medical leave from 01.07.1976 to 02.07.1981, i.e., for a period of five years and two days. Of course it is stated that the original service book of the petitioner is completely silent over the matter but then the petitioner can hardly be

blamed for the same. Surprisingly, after having stated as above under paragraph-4 it is again stated under paragraph-12 as follows:

"xxxxxx On that date the applicant was not in service but absconded without informing the competent authority violating Rule 72(2) of Orissa Service Code. As per Rule-36 of OCS (Pension) Rules, 1992 the interruption period of the applicant cannot be condoned."

7. In paragraph-13 it is stated that the pension sanctioning authority, i.e., the Block Education Officer or appropriate authority cannot condone the break of service in favour of the petitioner as qualifying service counted towards pension from 01.07.1976 to 31.10.1997 (absconded period) to make it qualifying service contrary to the above provisions, i.e., Explanation (2) of Rule 36 of OCS (Pension) Rules, 1992.

8. In paragraph-15 of the counter it is stated that the type of retirement on 31.10.1997 may not be treated as "retiring pension" and that in case it is treated as retiring/superannuation pension, the date of superannuation would be 31.10.1997 and taking into consideration the date of birth of the petitioner as

13.10.1939, the period of absence from 01.07.1976 to 31.10.1997 requires regularization by the competent authority. It is also stated that the petitioner does not satisfy any of the conditions stipulated in Rule 4 of the 1981 Rules. The above pleas have been taken, more or less in the impugned order under Annexure-10.

9. From the above narration, it is evident that the opposite parties have not taken a consistent stand in the matter rather the same appear to be prevaricating in nature. On one hand it is admitted that the petitioner was on medical leave and was not allowed to resume his duty as another teacher had been adjusted in his place yet on the other hand, it is stated that the petitioner had abandoned the service. It goes without saying that law prescribes a procedure to be adopted in case of voluntary abandonment of service by the government servant as contemplated under Rule 72 (2) of the Odisha Service Code, which is as follows:

“72. Removal of government servant after remaining leave for a continuous period exceeding five years.

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(2) Where a Government servant does not resume duty after remaining on leave for continuous period of five years, or where a government servant after the expiry of his leave remains absent from duty otherwise than on foreign service or on account of suspension, for any period which together with the period of the leave granted to him exceeds five years, he shall unless Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in the Odessa Civil Services (Classifications, Control and Appeal) Rules 1962.”

Such procedure was admittedly not followed in the case of the petitioner. A formal order of termination of service was never issued by the appropriate authority against the petitioner. Such being the factual position, the only inference available to be drawn is that the petitioner must be deemed to have been in employment during the entire period till the date of his retirement on superannuation. Of course no formal order of retirement has also been passed but having regard to his date of birth it is evident that he would have retired on 31.10.1997.

10. As regards voluntary abandonment of service, admittedly, the term “abandonment of service” has not been defined as such either in the Service Code or in the 1992 Rules or in the 1981 Rules.

The following observations of the Supreme Court of India in the case of **G.T. Lad v. Chemical and Fibres of India Ltd.**, reported in (1979) 1 SCC 590 are highly relevant.

“In the Act, we do not find any definition of the expression “abandonment of service”. In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word “abandon” has been explained as meaning “to leave completely and finally; forsake utterly; to relinquish, renounce; to give up all concern in something”. According to the Dictionary of English Law by Earl Jowitt (1959 Edn.) “abandonment” means “relinquishment of an interest or claim”. According to Black's Law Dictionary “abandonment” when used in relation to an office means “voluntary relinquishment”. It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute an “abandonment of office”.

From the connotations reproduced above it clearly follows that to constitute abandonment, there must be total or complete giving up of duties so as to indicate an intention not to resume the same. In Buckingham & Carnatic Co. v. Venkatiah [AIR 1964 SC 1272 : (1964) 4 SCR 265 : (1963) 2 LLJ 638 : (1963-64) 25 FJR 25] it was observed by this Court that under common law an inference that an employee has abandoned or relinquished service is not easily drawn unless from the length of absence and from other surrounding circumstances an inference to that effect can be legitimately drawn and it can be assumed that the

employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention, and normally, such an intention cannot be attributed to a employee without adequate evidence in that behalf. Thus, whether there has been a voluntary abandonment of service or not is a question of fact which has to be determined in the light of the surrounding circumstances of each case.”

Thus it is a matter of inference to be drawn from the facts and surrounding circumstances of the case as to whether there has been a voluntary relinquishment on the part of the employee.

11. In the case of **D.K. Yadav v. J.M.A. Industries Ltd.**, reported in (1993) 3 SCC 259 it was held that since right to life enshrined in Article 21 of the Constitution includes the right to livelihood, the inference of abandonment of service and the consequent termination must be drawn consistent with the principles of natural justice or fair play.

12. In the instant case, there is nothing on record to even remotely suggest that the petitioner had intended to abandon his service. On the contrary, it is borne out from the records that after recovering from his illness and being declared medically fit, the petitioner approached the

authorities for permission to resume his duties but he was not allowed to do so. Neither any disciplinary proceeding was initiated against him nor any action was taken in the matter for as long as 16 years, i.e., from 1981 to 1997 when the petitioner attained the age of superannuation. Therefore, it is not open to the opposite party authorities to contend that the petitioner had voluntarily abandoned his service.

13. The Odisha Service Code, under Rule 72 provides the procedure to be adopted in case of unauthorized leave for more than five years. As already stated, such a procedure has not been followed in the instant case. Thus, in the absence of any rules, or action taken under Rule-72, break in service obviously cannot be simply inferred.

14. The above being the factual scenario of the case, there is no way by which the authorities could have inferred voluntary abandonment of service by the petitioner, rather he having made all attempts to resume his duties and being unsuccessful only because of

inaction of the authorities, must be deemed to have been in employment all through till the date of his retirement on attaining the age of superannuation. Significantly, the petitioner had already rendered more than the qualifying service, i.e., 15 years even prior to the so-called break in service which makes him entitled to pension under the rules. The responsibility of condoning the so-called break in service or regularization of such period rests with the concerned authorities and not with the petitioner and therefore, for the inaction of the authorities in this regard the petitioner cannot be deprived of his legitimate dues. In fact, Rule 36 of the 1992 Rules provides for condonation of interruption in service and reads as under:

“36. Condonation of interruption in service- (a)

Upon such conditions as it may think fit in each case to impose, the authority competent to fill the appointment held by a Government servant at the time condonation is applied for, may condone all interruptions in his service.

(b) In the absence of a specific indication to the contrary in the service book, an interruption between two spells of civil service rendered by a Government servant under Government shall be treated as automatically condoned and the pre-interruption service treated as qualifying service. The period of interruptions itself shall not count as qualifying service.

(c) Nothing in clause (a) and (b) shall apply to interruption caused by resignation, dismissal or removal from service.”

Therefore, it is for the concerned authorities to pass necessary orders to condone the interruption in the of service and to regularize such period.

15. Coming to the relevant rules, it is seen that Rule 4 of the 1981 rules provides as under:

4. Subject to the conditions in other rules under the chapter, an employee shall be eligible for pension or gratuity, as the case may be:

(1) On retirement by reason of his attending the age of superannuation; or

(2) On voluntary retirement or retirement by the appointing authority after completion of thirty years of qualifying service or the age of fifty years; or

(3) On retirement before the superannuation on medical certificate of Permanent incapacity for further service; or

(4) On termination of service due to the abolition of the post; or

(5) On closer of the college or school, as the case may be, due to withdrawal of recognition of the said college or school or other causes.

In view of the discussion made hereinbefore it is evident that clause-1 of Rule 4 squarely applies to the case of the petitioner.

16. It must be kept in mind that pension or retirement benefit is not a bounty or favour to be given to the government servant but is his rightful due upon rendering the required length of service. As already stated, the petitioner had rendered 15 years of service prior to his availing leave on medical grounds. In view of the foregoing discussion, the petitioner cannot be blamed for the inaction of the authorities in regularizing the so-called break in service. This leads to the natural inference that the petitioner must be deemed to have been in service all through till he attained the age of superannuation. Of course, the petitioner would not be entitled to any salary or other financial benefits for the period during which he had not performed any work but insofar as pension is concerned, he having rendered qualifying service, cannot be deprived of the same. For the above reason, the impugned order under Annexure-10 cannot be sustained in the eye of law.

17. For the foregoing reasons, therefore, the writ application is allowed. The office order dated 04.12.2017

under Annexure-10 is hereby quashed. The opposite party authorities are directed to regularize the service of the petitioner as per Rules and to release his pension and other retirement benefits without any further delay and in any case, not later than three months from the date of communication of this order or on production of certified copy thereof by the petitioner.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 27th July, 2022/ A.K. Rana

