

ORISSA HIGH COURT: CUTTACK

W.P.(C) NO. 7612 OF 2019

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR

Ramesh Sahoo

.....

Petitioner

-Versus-

State of Odisha and others

.....

Opp. Parties

For Petitioner : Ms. S. Mohapatra,
Advocate

For Opp. Parties : Mr. S. Rath,
Addl. Standing Counsel

P R E S E N T:

**THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
HONOURABLE MR. JUSTICE G. SATAPATHY**

Date of hearing: 21.10.2022 :: Date of judgment : 28.10.2022

DR. B.R. SARANGI, J. The petitioner, who was working as a Cook under the administrative control of opposite party no.3, has filed this writ petition seeking to quash the order dated 27.02.2019 passed in O.A. No. 2845 (C) of

2015 under Annexure-14, by which the Odisha Administrative Tribunal, Cuttack Bench, Cuttack has dismissed the Original Application filed by the petitioner without interfering with the order of disengagement under Annexure-7 dated 06.11.2013, so far as it relates to him, as well as order of rejection of his representation dated 13.07.2015 under Annexure-11, which was passed in pursuance of the order dated 03.03.2015 passed by the Odisha Administrative Tribunal, Bhubaneswar in O.A. No. 1081 of 2014.

2. The brief facts leading to filing of this writ petition are that the opposite party no.3 issued an advertisement to fill up the post of Cook. Pursuant to such advertisement, the petitioner submitted his application and the same having found in order he was issued with a call letter on 25.06.2009 to participate in the process of selection. Thereafter, the petitioner was selected and appointed as Cook in the office of opposite party no.3-Commandant, Special Operation Group,

Chandaka, Bhubaneswar, vide appointment letter issued on 21.08.2009, on contractual basis for a period of six years. While the petitioner was discharging his duties, on 23.04.2011, he was selected for a Special Training Course, i.e., PCIC-39 to be held in the Training Centre, National Security Guard, Maheswar Post, Gurgaon, Haryana. While he was on duty under SOG, the petitioner suffered from serious fever and jaundice and treated by the Doctor of CHC, Papadahandi in the district of Nabarangpur on 02.09.2013. As he could not be cured by the treatment, the doctor advised him for referral treatment and also bed rest. Consequentially, he applied for leave to Team in-charge Officer, Dy. Subedar, Papadahandi in the district of Nabarangpur which was also sanctioned, as he was suffering from jaundice and fever.

2.1 As he was not cured from the fever and jaundice and the same was increasing day by day, Medical Officer, CHC, Jatni in the district of Khurda

advised him to take complete bed rest by continuing medicine for the period from 25.09.2013 to 20.11.2013. During the said period he was undergoing treatment and on the basis of medical prescription he was taking complete bed rest by continuing medicines. But as per office order bearing BO No.22 dated 06.11.2013, the petitioner was discharged from contractual service by the Commandant, SOG, Chandaka, Bhubaneswar owing to remaining absent w.e.f. 21.09.2013 to 30.09.2013, though the authority had sanctioned the leave for the said period. As such, the said order of discharge was passed as per Clause-(i) of the Office Memorandum No.23689 dated 23.06.2012 of the Finance Department.

2.2 Thereafter, though the petitioner filed three representations in writing before the D.G. of Police, I.G. (Operation) of Police and Commandant, SOG, Chandaka, Bhubaneswar on 05.12.2013, but the same were not considered. Finding no other way out, the petitioner filed O.A. No. 1081 of 2014, which was disposed of by the

tribunal by order dated 03.03.2015 directing opposite party no.2 to consider and dispose of the representation filed by the petitioner in accordance with law by giving an opportunity of hearing to the petitioner. In pursuance of the order passed by the tribunal, opposite party no.2, vide order dated 13.07.2015 rejected the representation/appeal of the petitioner on the ground that as per office memorandum dated 23.06.2012 of the Finance Department, the petitioner was automatically discharged from service. Aggrieved by the aforesaid order, the petitioner filed O.A. No. 2845 of 2015, where the State-opposite parties filed counter affidavit and the petitioner also filed additional affidavit stating therein that Group-D posts are created in lieu of regular posts and he was allowed to continue as a Cook on contractual basis, and that the petitioner, having remained on leave duly sanctioned by the authority, at no point of time he was overstayed, but opposite party no.2, without considering the same in proper perspective, in view of office

memorandum dated 23.06.2012 issued by the Finance Department, rejected the representation of the petitioner by holding that he was automatically discharged/terminated from service. But the tribunal dismissed the Original Application filed by the petitioner without interfering with the order of disengagement under Annexure-7 dated 06.11.2013, so far as it relates to him, as well as order of rejection of his representation under Annexure-11 dated 13.07.2015, which was passed in pursuance of the order dated 03.03.2015 passed by the Tribunal in O.A. No. 1081 of 2014. Hence, this writ petition.

3. Ms. S. Mohapatra, learned counsel for the petitioner contended that the term 'automatic termination from service' is foreign to service jurisprudence. With regard to the provision contained in Clause-(ii) of the office memorandum dated 23.06.2012 issued by the Finance Department, Government of Odisha, that unauthorized absence for a continuous period of 15 days

or more will automatically terminate his/her engagement, on which reliance was placed by the authority, it is contended that the petitioner having remained on leave due to his illness with the knowledge of the authority concerned, the automatic termination of his engagement cannot sustain in the eye of law and, as such, the same is an outcome of non-application of mind. It is further contended that the Tribunal has committed gross error apparent on the face of the record by relying upon the terms and conditions of the contract of appointment under clause-(c) of Annexure-2 that no leave will be allowed during the service period except on Government holidays that too with prior permission/approval of the competent authority. The petitioner was adhering to the terms and conditions of the contract in Annexure-2, but due the situation beyond his control and on the basis of the advice given by the doctor and being permitted by the authority by sanctioning the leave, if the petitioner availed the leave, that by itself cannot be construed that he has

violated the terms and conditions of the contract of appointment and, as such, there cannot be any automatic termination of service in view of the office memorandum issued by the Finance Department, Government of Odisha, on 23.06.2012. It is further contended that the State being a model employer must understand the difficulties of the employee under which circumstances he has taken leave and with the knowledge of the authority. Thereby, automatic termination of service could not have been made pursuant to the office memorandum issued by the Finance Department on 23.06.2012. Consequentially, she seeks for quashing of the order of automatic termination of service issued by the authority on 06.11.2013 in Annexure-7 and confirmation made thereof by the Tribunal vide order dated 27.02.2019 in Annexure-14.

To substantiate her contention, learned counsel for the petitioner relied upon the judgments of the apex Court in the cases of ***Krushnakant B. Parmar v. Union***

of India, (2012) 3 SCC 178; *Laxman Dundappa Dhamanekar and others v. Management of Vishwa Bharata Seva Samiti and others*, (2001) 8 SCC 378; *Karunakar Khandapani v. State of Orissa*, 2015 (II) OLR 26; and *Pravat Kumar Mishra v. State of Orissa*, 2015 (II) OLR 963.

4. Mr. S. Rath, learned Addl. Standing Counsel appearing for the State-opposite parties contended that admittedly the petitioner was working as Contractual Cook w.e.f. 03.09.2009 in the office of the Commandant, SOG, Chandaka, Bhubaneswar. But he remained unauthorized absence for the period from 21.09.2013 to 31.10.2013 in total 41 days. Therefore, as per the Government of Odisha, Finance Department office memorandum dated 23.06.2012, since the petitioner had remained unauthorized absence for more than 15 days, he was to be automatically discharged from service. Invoking the very same clause, the petitioner was discharged from service and, therefore, no illegality or irregularity has been

committed by the authority in issuing the automatic order of termination/discharge against the petitioner, in view of the office memorandum issued by the Finance Department, as referred to above. It is further contended that the petitioner was deputed to SOG Assault Team No.29 camp at Papadahandi P.S. in the district of Nabarangpur to perform his duty vide Command No.833620 dated 05.07.2012 and the Team in-charge of the camp at Papadahandi PS intimated the Commandant SOG, Chandaka, vide his message no.66 dated 28.09.2013, that the petitioner remained absent from duty w.e.f. 21.09.2013, and that the Team in-charge had not intimated about the alleged illness and treatment of the petitioner at Papadahandi PHC nor was it intimated to him by the petitioner at any point of time. It is further contended that the petitioner also not intimated with regard to the alleged illness and treatment at Jatni PHC from 25.09.2013 to 20.11.2013. Consequentially, by following the office memorandum dated 23.06.2012, the

petitioner was discharged from service automatically. Thereby, no illegality or irregularity has been committed by the authority in passing the order impugned and, as such, the Tribunal is well justified in dismissing the Original Application filed by the petitioner. Consequentially, he seeks for dismissal of the writ petition.

5. This Court heard Ms. S. Mohapatra, learned counsel for the petitioner and Mr. S. Rath, learned Addl. Standing Counsel appearing for the State-opposite parties by virtual mode and perused the records. Since it is a certiorari proceeding and the matter is pending since 2009 and that the State has not preferred to file any counter affidavit, this Court allowed the parties to proceed with the hearing on the basis of materials available on record and with the consent of learned counsel for the parties, this Writ Petition is being disposed of finally at the stage of admission.

6. As a matter of fact, on 21.08.2009, the petitioner was appointed as a Cook on contractual basis by following due procedure. While he was discharging his duties at Papadahandi PS, he suffered from illness and remained absent on 21.09.2013. But, as has been stated by the opposite parties, he remained unauthorized absence for more than 15 days and, thereby, in view of office memorandum dated 23.06.2012 of the Finance Department, Govt. of Odisha, he was automatically discharged from service. Whether the petitioner was in unauthorized absence or not, is a matter to be considered taking into account the reasons for such absence. If the petitioner had remained absent due to his illness, which is supported by sufficient medical documents, such as, the prescriptions provided by the doctors treating him, without getting any instructions or report to the contrary or without examining him, the immediate steps taken for his automatic discharge/termination from service, that too

without following due procedure, is too harsh on the part of the State, which is a model employer.

7. It is of relevance to note that 192 nos. of Group-D contractual posts were created in lieu of regular posts and some of the contractual employees like the petitioner have already been regularized in service, but the petitioner has faced automatic discharge/termination from service. The sole reason for automatic discharge of the petitioner from service rests on Clause-(c) of the contract of agreement, which envisages that no leave will be allowed during the service period except on Government Holidays that too with prior permission/approval of the competent authority, and the Finance Department notification dated 23.06.2012, by which it has been stated that unauthorized absence for a continuous period of 15 days or more will automatically terminate his/her engagement. It is contended that since the petitioner remained absent continuously for more than 15 days, in view of the terms and conditions of the contract of appointment under

Clause-(c) read with Clause-(ii) of the office memorandum dated 23.06.2012 of the Finance Department, automatic termination/discharge from service has been made. But fact remains, the opposite parties have not acted rationally while passing such order, as absence of the petitioner from duty was due to his illness, such as, fever and jaundice and, as such, the treating doctors advised him to take bed rest with medication because the illness was acute and time and again his treating doctors prescribed him to take medicines which fact is also placed on record.

8. It may be noted that there is no nomenclature of automatic discharge/termination from service under the service jurisprudence. More so, even though the petitioner was appointed to a contractual post, before taking a drastic step of termination/discharge from service on the plea that conditions stipulated in the contract agreement and office memorandum issued by the Finance Department were violated, he should have been at least given an opportunity of hearing instead of throwing

him out from service. The State utilized the service of the petitioner when he was in good health condition. Therefore, automatic discharge/termination from service when the petitioner fell ill is not a good example, as the State is a model employer.

9. The phraseology used in the office memorandum dated 23.06.2012 in Annexure-8 with regard to “automatic termination” due to unauthorized absence for continuous period of 15 days itself is an unknown concept to the service jurisprudence. More so, in case of contractual employment also automatic termination cannot be sustained in the eye of law.

10. In **Krushnakant B. Parmar** (supra), the apex Court held that in a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in absence of such finding, the absence will not amount to misconduct.

11. In ***Laxman Dundappa Dhamanekar*** (supra), while considering whether the appellants having been appointed on probation they would be deemed to have become regular teachers on expiry of probationary period, the apex Court did not feel inclined to go into that question in view of the fact that even though the appellants were probationers, their services could not be ceased to have effect either by non-approval by the Head of the Department or by their remaining absent from their respective duties and there is no provision either in the Act or the Rules providing for automatic termination of services of a teacher on account of being absent without leave. If any teacher remains absent without any leave, it is open to the Management to terminate the services of such teacher only after complying with the provisions of the Act and the Rules or principles of natural justice. In the said case, the apex Court did not find any provision either in the Act or Rules providing for automatic termination of service of a teacher in the event of a teacher

remaining absent without leave. By observing so, the apex Court held that in absence of such a provision in the Act or Rules, the alleged deemed termination of services of the appellants without giving any opportunity to the appellants was unlawful and deserves to be set aside.

12. In **Karunakar Khandapani** (supra), this Court already held that termination of service of the petitioner having been done without following due procedure of law and without complying the principles of natural justice, the order of termination cannot be sustained, and by so holding this Court quashed the order of termination issued against the petitioner and directed that the petitioner is deemed to be continuing in service.

13. In **Pravat Kumar Mishra** (supra), this Court, relying upon the judgment rendered in the case of **Karunakar Khandapani** (supra), held that the order impugned passed without complying the principles of natural justice, is *non est* in the eye of law, since no

opportunity was given before passing the order of termination. In the said case, this Court also placed reliance on the decisions of the apex Court in the cases of **R. Solochan Devi v. D.M. Sujatha**, AIR 2005 SC 4152 and **Krishan Lal v. State of J&K**, (1994) 4 SCC 422, by which the apex Court has held that an order passed in violation of the principles of natural justice renders the same invalid. Reliance was also placed on the judgment delivered in **K. Khandapani** (supra) and it was held that since the petitioner faced termination without following due procedure of law and without complying with the principles of natural justice, the order impugned cannot sustain.

14. Applying the aforesaid principles to the present context, it can be safely held that the order of automatic termination/discharge of the petitioner from service has been passed in violation of principles of natural justice and, therefore, the same is void and is a nullity in the eye of law.

15. In view of such position, even though the petitioner was appointed as Contractual Cook, but without giving him any opportunity of hearing his automatic termination/discharge from service cannot have any justification. Thereby, Clause-(ii) of the office memorandum dated 23.06.2012 in Annexure-8 issued by the Finance Department of the Govt. of Odisha is held to be *ultra vires* to Articles 14 and 16 of the Constitution of India. As a result thereof, the order dated 27.02.2019 passed by the Tribunal in O.A. (C) No. 2845 of 2015 confirming the order of termination/discharge passed by the authority in Annexure-14 without considering the rudiments of law, cannot sustain and the same is liable to be quashed and is hereby quashed. Consequentially, the order of automatic termination/discharge issued in favour of the petitioner on 06.11.2013 under Annexure-7, so far as it relates to the petitioner, also cannot sustain in the eye of law and the same is liable to be quashed and is hereby quashed, as the same has been passed without

following due procedure of law and is in gross violation of the principles of natural justice. The opposite parties are directed to allow the petitioner to join in service and extend all consequential service and financial benefits admissible to him, by notionally fixing the same, from the date of joining, as this Court has already held that automatic termination/discharge of the petitioner from service is bad in the eye of law.

16. In the result, the writ petition is allowed. However, there shall be no order as to costs.

.....
DR. B.R. SARANGI,
JUDGE

G. SATAPATHY, J. I agree.

.....
G. SATAPATHY,
JUDGE

Orissa High Court, Cuttack
The 28th October, 2022, Ashok/GDS