

IN THE HIGH COURT OF ORISSA AT CUTTACK

RVWPET (RPC) No.137 of 2016

Mahammed Sadeque *Petitioner*

-versus-

State of Odisha and Ors. *Opp. Parties*

Advocates appeared in the case:

For Petitioner : *Mr. K.K. Rout, Adv.*

-versus-

For Opp. Parties : *Mr. D.R. Mohapatra, SC*
(for S & ME Deptt.)

CORAM:
DR. JUSTICE S.K. PANIGRAHI

DATE OF HEARING:-06.07.2022

DATE OF JUDGMENT:-13.09.2022

Dr. S.K. Panigrahi, J.

1.The review Petitioner had filed the O.A. No. 2850(C) of 2014 seeking a direction to the Opposite Parties to sanction and release his pension and other retiral benefits with effect from 01.06.2011 including gratuity, leave salary etc. within a stipulated time. The case of the review petitioner is that he was appointed as a Primary School Teacher on 12.10.1974 by the order of the District Inspector of Schools, Jagatsinghpur and he

continued as Primary School Teacher till 14.11.1984. Since the review petitioner fell ill and suffered from various ailments, he submitted his leave application to the authorities from time to time. The review petitioner was absent from his duties from 15.11.1984 to 31.5.2011 because of his ailments and ultimately on attaining the age of superannuation he retired from service on 31.5.2011. The review petitioner also averred in the Original Application that during the period of leave, without any communication or without any disciplinary proceeding being initiated against him, his services were terminated. Therefore, in view of the Rule 72(2) of the Orissa Service Code, the review petitioner is deemed to be continuing in service and is entitled to get pension and other retiral benefits.

2. In view of the Rule 72(2) of the Orissa Service Code, if a Government servant does not resume duty after remaining on leave for a 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 Orissa Civil Services

(Classification, Control and Appeal) Rules, 1962. The said Rule 72(2) of the Orissa Service Code reads as follows:

"Rule 72(2) Where a Government servant does not resume duty after remaining on leave for a 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 Orissa Civil Services (Classification, Control and Appeal) Rules, 1962."

The Orissa Civil Services (Classification, Control and Appeal) Rules, 1962 clearly provides that for removal from service, the detailed procedure prescribed under Rule 15 is to be followed.

3. The grievance of the petitioner is that the Review petitioner was removed from service without following the due procedure. Hence his removal from service is illegal and he is entitled to get pension and other retiral benefits. The Ld. Tribunal upon hearing the parties and having relied on judgment passed by the Apex Court in *Syndicate Bank -v- State Association*¹, and *Aligarh Muslim University -v- Mansoor Ali Khan*², dismissed the Original Application vide

¹ (2000) 5 SCC 65

² (2000) 7 SCC 529

order dated 21.10.2016 with the observation that review petitioner is not entitled to pension and other retiral benefits because of long absence from duty. The said order of the Tribunal is under review.

4.Learned counsel for the petitioner submits that impugned judgment and order dated 21.10.2016 passed by the learned Tribunal is liable to be recalled reviewed in view of the fact that the judgments of the Apex Court cited by the State were given in different context where rules are different. Therefore, those judgments have no application to the present case and when there is a specific rule Rule 72(2) of the Orissa Service Code which is binding upon the petitioner and the State authorities. Therefore, on this ground alone, the judgment and order dated 21.10.2010 is able to be recalled/reviewed and the review petition may be allowed and necessary direction may be made to the opposite parties to grant pension and other retiral benefits in favour of the petitioner in view of the Rule 72(2) of the Orissa Service Code.

5.He further submits that the present case is squarely covered by the judgment dated 31.08.2010 of the learned Tribunal rendered by the Division Bench in O.A. No. 1919(C) of 1994 wherein the Tribunal while dealing with the similar point allowed the said case. He further contended that the petitioner

herein was not absent deliberately rather physical illness has compelled him to remain absent for such a long time. He has also informed the appropriate authority about the illness by way of several leave applications.

6. He further submitted that the petitioner rendered his services in Government Primary School for the period from 12.10.1974 to 14.11.1984 which is more than 10 years. Besides that even assuming for the sake of argument and not for conceding sake that the petitioner remained unauthorized absent from 15.11.1984 he reached the age of superannuation, i.e. 31.5.2011, then also no disciplinary proceeding was initiated against him during the said period and no communication was made with him. Under the CCA Rules removal is a major punishment within the meaning of Rule 13 of the Orissa Civil Services (CCA) Rules, 1962. In order to impose a major punishment a detailed procedure has been prescribed under Rule 15 of the CCA Rules. Therefore, when the petitioner remained absent for more than 5 years, the authorities would have removed him from service as per Rule 72 of the Orissa Service Code by taking recourse to Rule 15 of the OCS (CCA) Rules, 1962. But in the present case no proceeding was initiated against the petitioner as per Rule 15 of the CCA Rules nor was he removed from service.

7. He further argued that this Court in the case of *Kishori Dash v. State of Orissa & others*³ has categorically held that if the Government has not removed the employee concerned by taking the recourse to Rule 72 (2) of the Orissa Service Code, he is entitled to get his pension. The learned Tribunal also had a similar view in a judgment passed by the Division Bench in *Kailash Chandra Sasmal v. State of Orissa*⁴ and directed for payment of pension by taking into account the actual service rendered by the petitioner of that case. Since the petitioner has already rendered services for more than 10 years, if his duty period is taken into account then also he is entitled to get minimum pension as per the Orissa (Pension) Rules, 1992 as the minimum qualifying period for getting pension is 10 years.
8. He further emphasized, on the question of limitation it was argued that since pension is a recurring cause of action as held by Supreme Court in *Shiv Dass vs Unim*⁵ and *Unim vrs Tarsem Singh*⁶. Therefore, the order dated 21.10.2016 passed in O.A. No.2850(C) of 2014 is a fit case to be reviewed and necessary direction be made to the opposite parties to release the pension in favour of the petitioner by taking into account

³ 105 (2008) CLT 309 in Para 12,13 and 14

⁴ O.A. No.1919 (C) of 1994, decided on 31.8.2010

⁵ (2008) 2 SCC(L &S) 765

⁶ (2007)2 SCC(L&S)-395

his actual service which he has rendered for more than 10 years of service.

9. Learned counsel for the School and Mass Education Department while resisting the prayer of the petitioner submitted that the Petitioner has signed the attendance register up to 14.11.1984 and since 15.11.1984 he has neither attended the school nor did he submit any leave application and remained absent without any intimation to the school authority. It was also specifically stated in the Counter Affidavit that the so-called leave application and the medical certificates as enclosed to the original application as Annexure-3 have not been received in the office of the then D. I. Of school nor did it reach to the office of the Opposite Party No.3. It was also urged that observation made by the Supreme Court in *Vijay S. Sathaye*⁷ which amplifies the contention of the School and Mass Department. It has been held that if an employee is absent beyond the prescribed period for which the leave of any kind granted, he should be treated to have resigned and abandoned the service and in such case there is no need to hold an enquiry or to give notice as it would amount to mere formalities. In the instant case, the applicant having remained absent from duties for

⁷ S.L.P. (C) No. 24229 24221 of 2007 in order dated. 06.09.2013

27 years as on the date of superannuation cannot claim any kind of pensionary benefit.

10. He further submitted that the learned Tribunal dismissed the original application vide order dated 21.10.2016 by passing a well-reasoned order. While dismissing the original application the learned Tribunal categorically held that the applicant had continued from 12.10.1974 to 14.11.1994 and by the time the school was taken over, the applicant had already abandoned his service and remained on leave continuously beyond the period for which leave cannot be granted. It was also observed by this learned Tribunal that the applicant was never converted to a regular Government servant and as such he is not entitled to the benefit of O.C.S. (Pension) Rules.

11. He further contended that there being no error apparent on the face of the order and consideration of grounds taken in the review petition would amount to re-hearing of the issue/case on merit especially when such grounds were taken and decided while passing the order sought for reviews. The review petition is liable to be dismissed as not maintainable. The law is well settled that while exercising the power of review, the Courts/ Tribunals should examine the error apparent on face of judgment.

12. Heard learned counsel for the parties. Admittedly, the petitioner has signed the attendance register up to 14.11.1984 and since 15.11.1984 he has neither attended the school nor did he submit any leave application and remained absent without any intimation to the school authority. It is also a fact that there has been no evidence shown by the Petitioner regarding the submission of medical Certificate and it has been received by the then D.I. of schools (now redesignated as B.E.O.). Moreover, the leave applications are up to 31.3.1990. There are absolutely no pleadings with respect to such facts, nor is there any evidence produced by the Petitioner with regard to submission of leave applications for the period from 1.4.1990 to 31.05.2011 which is more than 21 years. It is further argued that the petitioner had rendered services in government primary school for the period from 12.10.1974 to 14.11.1984 which is more than 10 years but he was not in service when the school was taken over by the Government. He remained unauthorized absent from 12.10.1974 to 14.11.1984 till he reached the age of superannuation on 31.5. 2011.

13. Unauthorized absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorised absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the

explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct. In the case of *State of Punjab vs P.L. Singla*⁸, the Supreme Court iterated that:

“9. An employee who remains unauthorisedly absent for some period (or who overstays the period of leave), on reporting back to duty, may apply for condonation of the absence by offering an explanation for such unauthorized absence and seek grant of leave for that period. If the employer is satisfied that there was sufficient cause or justification for the unauthorized absence (or the overstay after expiry of leave), the employer may condone the act of indiscipline and sanction leave post facto. If leave is so sanctioned and the unauthorized absence is condoned, it will not be open to the employer to thereafter initiate disciplinary proceedings in regard to the said misconduct unless it had, while sanctioning leave, reserved the right to take disciplinary action in regard to the act of indiscipline. We may note here that a request for condoning the absence may be favourably considered where the unauthorized absence is of a few days or a few months and the reason for absence is stated to be the sudden, serious illness or unexpected bereavement in the family. But long unauthorized absences are not usually condoned. In fact in Security services where discipline is of utmost importance, even a few of

⁸ Civil Appeal No. 4969 of 2008 (Supreme Court)

days overstay is viewed very seriously. Be that as it may.

10. Where the employee who is unauthorizedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorised absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence. Where the punishment is either dismissal or removal, it may not be necessary to pass any consequential orders relating to the period of unauthorized absence (unless the rules require otherwise). Where the punishment awarded for the unauthorized absence, does not result in severance of employment and the employee continues in service, it will be necessary to pass some consequential order as to how the period of absence should be accounted for and dealt with in the service record. If the unauthorized absence remains unaccounted, it will result in break in service, thereby affecting the seniority, pension, pay etc., of the employee. Any consequential order directing how the period of absence should be accounted, is an accounting and administrative procedure, which does not affect or supersede the order imposing punishment."

14. Similarly, in the case of *Krushnakant B. Parmar vs Union Of India & Anr.*⁹, the Supreme Court held that:

“16. The question whether ‘unauthorised absence from duty’ amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful.

18. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.”

15. Moreover, it has been well established by law that the employee after having been held guilty of unauthorised absence from duty cannot claim the benefits earned during the period of unauthorised absence in the absence of a specific direction in that regard. This has been iterated in the

⁹ Civil Appeal No.2106 of 2012 (Supreme Court)

case of *A.P.S.R.T.C. And Anr vs S. Narsagoud*¹⁰, wherein it was held that:

“There is a difference between an order of reinstatement accompanied by a simple direction for continuity of service and a direction where reinstatement is accompanied by a specific direction that the employee shall be entitled to all the consequential benefits, which necessarily flow from reinstatement or accompanied by a specific direction that the employee shall be entitled to the benefit of the increments earned during the period of absence. In our opinion, the employee after having been held guilty of unauthorised absence from duty cannot claim the benefit of increments notionally earned during the period of unauthorised absence in the absence of a specific direction in that regard and merely because he has been directed to be reinstated with benefit of continuity in service.”

16. It is also a fact that no disciplinary proceedings initiated against the petitioner under Rule 72 (2) of the Orissa Service Code. The said Rules prescribes that if a government servant does not resume duty after remaining on leave for a continuous period of five years, he shall be removed from service after following the procedure laid down in the Orissa Civil Services (classification, control, appeal) rules from 1962. In order to impose a major punishment a detailed procedure has been prescribed under rule 15 of the CCA rules. In fact, even if the Department has not followed the disciplinary

¹⁰ Appeal (civil) 6362 of 2000 (Supreme Court)

proceedings under Rule 72 (2) of the Orissa Service Code, the continuous absence of the petitioner for such a long time cannot entitle him the pensionary benefit.

17. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. Nor can a person claim any right arising out of his own wrong doing. In regards to the same, the Supreme Court in the case of *Devendra Kumar vs State Of Uttaranchal & Ors.*¹¹ held that:

“23. More so, if the initial action is not in consonance with law, the subsequent conduct of a party cannot sanctify the same. “Subla Fundamento cedit opus”- a foundation being removed, the superstructure falls. A person having done wrong cannot take advantage of his own wrong and plead bar of any law to frustrate the lawful trial by a competent Court. In such a case the legal maxim Nullus Commodum Capere Potest De Injuria Sua Propria applies. The persons violating the law cannot be permitted to urge that their offence cannot be subjected to inquiry, trial or investigation. (Vide: Union of India v. Maj. Gen. Madan Lal Yadav¹²; and Lily Thomas v. Union of India & Ors.¹³).”

¹¹ AIR 2013 SC 3325.

¹² AIR 1996 SC 1340

¹³ AIR 2000 SC 1650

18. In view of the above, the instant Review Petition filed by the
Petitioner is devoid of merit and the same is dismissed.

(Dr. S.K. Panigrahi)
Judge

Orissa High Court, Cuttack,
Dated the 13th of September, 2022/B. Jhankar

