(2016) 02 OHC CK 0032

ORISSA HIGH COURT

Case No: W.P. (C) No. 963 of 2016

Basanta Kumar Das		APPELLANT
	Vs	
Governing Body of Taratarini College and Others		RESPONDENT

Date of Decision: Feb. 24, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151, Section 152, Section 153
- Constitution of India, 1950 - Article 41, Article 43
- Orissa Education Act, 1969 - Section 10, Section 10-A, Section 10-A(1), Section 10-A(1)(a), Section 10-A(2),

Hon'ble Judges: Biswanath Rath, J.

Bench: Single Bench

Advocate: S.K. Das, S.K. Mishra and S.R. Kara, for the Appellant; D.K. Mohapatra and M. Misra, for the Respondent

Final Decision: Allowed

Judgement

Biswanath Rath, J.

1. This writ petition was filed assailing an order dated 5.7.2003 passed by the Presiding Officer, State Education Tribunal as appearing at Annexure-5 to the writ petition.

2. The short background involved in the case is that pursuant to creation of vacancy in the post of Librarian of the College and on the basis of notice inviting applications against the said post by the College Authority, the petitioner submitted his application for the post of Librarian in the Taratarini College. Having been found suitable in an interview, the petitioner was given appointment by the College Authority in the said post on 30.12.1986. Since the petitioner had no appropriate qualification of Bachelor Degree in Library Science, a condition was put in the appointment order requiring the petitioner to acquire the appropriate qualification

within a period of one year. His joining report being accepted, he was discharging his duties as Librarian of the College. While he was continuing as such, he suffered from prolonged illness and remained under the treatment at M.K.C.G. Medical College, Berhampur. For better treatment, he had to shift himself to Hinduja Hospital in Bombay and after recovering from his illness, Petitioner submitted his joining report on 5.11.1993. Even though his joining report was accepted, yet he was not allowed to discharge his duty in the post of Librarian of the College on some plea or other and in a surprising attempt, the petitioner was served with a termination order on 2.5.2001. Petitioner challenged the said order of termination before the State Education Tribunal, Bhubaneswar alleging that the order is not only illegal and arbitrary but also in violation of principle of natural justice. Besides, the termination order being passed without following the procedure of law in as much as the provision contained in Rule 22 of the Recruitment Rules, 1974 requiring no imposition of major penalty without following an inquiry. Petitioner also claimed that the order of termination is also bad as it lacks approval of the competent authority following Section 10-A of the Orissa Education Act. The appeal at the instance of the petitioner before the State Education Tribunal was registered as Appeal No. 7 of 2001. Following notice in the matter, the opposite party Nos. 1 and 2 appeared and filed their counter. Upon hearing the parties, the Tribunal finally passed the judgment in Appeal No. 7 of 2001. The Tribunal even though categorically held that the order of termination vide Annexure-1 therein as illegal and arbitrary but unfortunately concluded the proceeding holding that the appeal is barred by limitation for having been filed after the stipulation period of limitation. At the same time, the Tribunal also came to hold that the claim of respondent No. 2 so far it relates to maintainability of the appeal for non-joinder of party like Kapileswar Das cannot be entertained. The appellate authority further also came to hold the appeal does not appear to be premature based on the submission of the respondents therein that the approval or refusal order thereof has not been communicated to the parties within the time stipulated under Section 10-A(2) of the Orissa Education Act 1969. While concluding the appeal, the Presiding Officer again came to hold that the appeal was disposed of with cost giving liberty to the Governing Body to proceed afresh after obtaining the written approval of the competent authority in the matter of termination of service of the petitioner and further holding that an order of termination with retrospective effect is not recognized in law. It is under the premises of lot of confusions in the conclusion of the appeal, the opposite party Nos. 1 and 2 filed an application under Rule 26 of the Orissa Education Tribunal Rules, 1977 for Tribunal''s exercising inherent power in considering the challenges made therein by the opposite party Nos. 1 and 2 against the final order in the appeal. After hearing both the sides, this proceeding was concluded by the final order dated 5.7.2003 available at Annexure-5. The Tribunal clarified its earlier view in the appeal to the extent that though there is no use of word dismissal but in effect the appeal has been dismissed.

3. In assailing the impugned order, Sri Das, learned counsel appearing for the petitioner contended that the action of the Management in terminating the petitioner suffers on several accounts; firstly the order of termination mandatorily required compliance of Section 10-A of the Orissa Education Act. Secondly the order of termination also suffers for not following the provisions contained in Rule 22 of the Recruitment Rules, 1974, which requires an inquiry before imposing major penalty and, thirdly, the appeal as required under Section 10 of the Act was filed within one month from the date of receipt of the order. Sri Das, learned counsel explaining his such contention further contended that the impugned order of termination was passed on 12.5.2001 and the copy of the same was served on the petitioner on 11.6.2001 and looking to the provision contained in Section 10-A(2) of the Orissa Education Act, the appeal was required to be filed within one month from the date of receipt of the order, the appeal having been filed on 11.6.2001, it was well within the time. Sri Das further contended that the incumbent continuing in the casual vacancy of the petitioner was a temporary holder of the post and was kept in-charge only, thus there was no need to implead the temporary holder of the post as a party to the appeal proceeding. Under the above circumstances, Sri Das claimed that the Tribunal had no other option than to allow the appeal. Sri Das lastly contended that the Education Tribunal by entertaining the further application of the opposite party Nos. 1 and 2 for review of the order passed in the appeal and looking to the tenure of the order vide Annexure-5, has exceeded its jurisdiction conferred on it under Rule 26 of the Orissa Education Tribunal Rules, 1977. Relying on a decision dated 30.6.1994 rendered in the case of Governing Body of Oupada College v. State of Orissa & Others, passed in O.J.C. No. 3266 of 1994 justified his contention saying that prior approval of the competent authority against an order of termination in exercise of power under Section 10-A(1) of the Orissa Education Act, 1969 is mandatory. Similarly, referring to a decision rendered by this Court in the case in between Gopinath Deb v. Budhia Swain, , 54 (1982) CLT 515, Sri Das, learned counsel for the petitioner contended that scope of inherent jurisdiction in a Court or Tribunal cannot be exceeded for reviewing of it''s own order. Similarly, referring to another decision in the case of Narayan Mishra v. State of Orissa & others, , (54) 1982 CLT 54, Sri Das contended that in view of the aforesaid decision, for the major penalty involved in the impugned order, the authority should have held an inquiry before passing such termination order. Under the above premises, Sri Das, learned counsel for the petitioner while claiming the order passed under Annexures-3 and 5 are all bad, requested this Court for interfering and setting aside the same and thereby directing for restoration of the service of the petitioner with grant of consequential benefits.

4. In his opposition, Sri D.K. Mohapatra, learned counsel appearing for the opposite party Nos. 1 and 2 taking resort to his counter affidavit contended that the petitioner was a provisionally appointed employee. He was found to be absent without permission for long period. Looking to the length of absenteeism,

particularly, in absence of permission from the authority, the case appears to be a case of abandonment of service. By not adhering to the conditions in the offer of appointment, the petitioner has violated the conditions imposed by the authorities. For his continuous absenteeism, finding difficulty in providing particular service, the Management decided to fill up the post of Librarian by keeping another person of the institution in-charge. The management was never intimated with regard to illness of the petitioner. There is clear violation of Rule 11 (c) of the 1974 Rules. Justifying the action of the management, Sri Mohapatra, learned counsel contended that in view of the service condition, the petitioner cannot claim leave as a matter of right. The Governing Body in its meeting dated 21.11.1998 vide resolution No. 4 resolved unanimously authorising the Principal-cum-Secretary to terminate the petitioner, as he has already abandoned his service. Following the letter of the Directorate dated 4.12.1998, the Principal of the College vide his letter dated 18.12.1998 furnished the required information seeking necessary action at the end of the Director. By letter dated 1.6.2000, the Management sought for approval of the Director for terminating the petitioner, but yet to receive any approval from the Director, Higher Education. It is further contended that in the meantime, the Governing Body of the College considered the report of the Sub-Committee dated 21.1.2001 and decided to terminate the appellant with effect from 29.9.1994. Further, referring to the preliminary counter affidavit of the Management, Sri Mohapatra, learned counsel while reiterating the stand already taken hereinabove, further submitted that from the conduct of the petitioner, it appears that the case of the petitioner is a clear case of abandonment of service. The Principal of the College having given a chance of personal hearing to the petitioner by his letter dated 12.1.2001 and the petitioner having attended the personal hearing, the allegation that the termination order has been passed without any inquiry or giving natural justice is unfounded. In course of his submission, Sri Mohapatra, learned counsel of course fairly contended that even though the management has applied for approval of the termination order following the provision contained in Section 10-A(1) of the Orissa Education Act, no such permission has yet been received from the Director of Higher Education. On the question of legal exercise of inherent power by the Tribunal, Sri Mohapatra, learned counsel contended that there is due discharge of authority following provisions contained in Rule 26 of the Rule, 1977, therefore the impugned order is appropriate and thus, there is no scope for interfering in the impugned order.

5. State counsel taking cue of the arguments made by the counsel for the opposite party Nos. 1 & 2 chose not to submit anything further.

6. From the background of the case, as narrated hereinabove, questions that fall for consideration of this Court are:

"(i) Whether the appeal was barred by time?

(ii) Whether the termination order mandatorily required compliance of the provision contained in Section 10-A(1) of the Orissa Education Act?

(iii) Since the termination involved major penalty, whether it required an inquiry before imposition of the major penalty of termination?

(iv) Whether the inherent power conferred on the Tribunal under Rule 26 of the Orissa Education tribunal Rule, 1977 can be converted to an application of review?

(v) Whether the long and unauthorized absence of the petitioner will be treated as willful abandonment of service?"

7. Before proceeding to answer on the questions, this Court feels it appropriate to reproduce certain background involved in the case. It is an admitted fact that the petitioner being selected against the post of Librarian, was given an offer of appointment against the said post vide order dated 30.12.1986. Though the petitioner was not having requisite qualification, but having been permitted by the authority, he had acquired the qualification in the particular subject within the period stipulated by the Management. The fact, as appears from the pleadings, petitioner while continuing as Librarian suffered from prolonged illness and was under treatment at M.K.C.G. Medical College, Berhampur and thereafter for better treatment, he was shifted to Hinduja Hospital, Bombay and after recovering from the prolonged treatment, he submitted his joining report on 5.11.1993. the joining report has not been accepted and in view of long absence, his case has been taken up by the Governing Body and the Governing Body vide it''s resolution No. 4 in it''s sitting on 21.11.1998 resolved unanimously consequently authorized the Principal-cum-Secretary of the college to terminate the appellant on the premises of abandonment of his service. The matter was taken up by the Director. The Management also furnished the required information to the Director seeking necessary action vide it''s letter dated 18.12.1998. By resolutions dated 21.12.1998, 23.3.1999 and 1.6.2000, the Principal also sought for approval of the Director for termination of the appellant. It is admitted by the Management in their counter before the appellate authority so also by the learned counsel appearing for them in this Court that no such approval has been granted by the Director of Higher Education in favour of the Management till filing of the counter. It also appears from the counter of the Management filed before the Education Tribunal that in view of authorization given to a Sub-Committee to look into the allegation/grievance involved in the matter and following submission of a report of the Sub-Committee dated 21.1.2001 the Governing Body in its sitting on 25.2.2001 decided to terminate the petitioner with effect from 29.9.1994. Further, from the counter affidavit filed by the opposite party Nos. 1 and 2 in this Court through their Lecturer in History, there is a clear statement to the effect that the Principal in the meantime by letter dated 12.1.2001 directed the petitioner to appear for a personal hearing. The petitioner attended the said personal hearing and as a consequence, the Governing Body thereafter by resolution dated 25.2.2001 formally resolved unanimously to

terminate the services of the petitioner with effect from 29.9.1994. It is necessary to indicate here also that during course of argument, Sri Mohapatra, learned counsel for the opposite party Nos. 1 and 2 very fairly submitted that the managing Committee''s request for grant of approval for termination of the petitioner has not been responded to by the Director as on date. During course of submission, Sri Mohapatra, learned counsel also fairly contended that there is no denial to the petitioner''s claim that the order of termination was served on him on 12.5.2001 and the appeal having been filed on 11.6.2001, there is no delay in filing the appeal and the appeal was very much maintainable following the provisions contained in Section 10-A(3) of the Orissa Education Act.

8. Under the above factual background, now coming to answer the questions framed by this Court. For convenience question No. (i) is reproduced hereunder:

"(i) Whether the appeal was barred by time?"

The provision fixing time limit in filing an appeal appearing at Section 10-A(3) of the Orissa Education Act, 1969 reads as follows:

"Section 10-A(3) any person aggrieved by an order passed under Sub-section (1) may prefer an appeal to the Tribunal within one month from the date of receipt of the order."

From the fact situation involved in this case, it is made clear that the order of termination of the petitioner was passed by the Management on 12.5.2001 and the copy of the order of termination was served on the petitioner on 11.6.2001. There is no denial to such submission by Sri Mohapatra, learned counsel appearing for the opposite party Nos. 1 and 2. In this view of the matter, this Court hold that the appeal was in time and consequently also hold that the finding of the Tribunal appearing at Annexure-3 that the appeal was barred by limitation is wrong and erroneous. Question No. (i) is answered accordingly.

Now coming to the question No. (ii) prepared by this Court, said question runs as follows:

"(ii) Whether the termination order mandatorily required compliance of the provision contained in Section 10-A(1) of the Orissa Education Act?"

The Orissa Education Act, 1969 at "Section 10-A(1)(a),this is a provision for obtaining approval before termination which reads as follows:

"1-A. Service of Teachers of aided institutions not to be terminated without approval: (1) The services of a teacher { and other members of the Staff } of an aided Educational Institution shall not be terminated without obtaining the prior approval in writing of the -

(a) {Director} in the case of teacher [and other members of the Staff] of a college;"

Reading of the above provision makes it abundantly clear that the provision for obtaining approval order of the Director before termination is mandatory.

From the factual back ground narrated hereinabove, this Court finds that the Managing Committee ultimately resolved termination of the petitioner in its resolution dated 25.2.2001 formally resolving to terminate the service of the petitioner with effect from 29.9.1994. Looking to the specific allegation, this Court finds no prior approval was obtained from the Director before terminating the petitioner and further considering the fair submission of learned counsel appearing for the Managing Committee that even though approval of the director was sought for in the matter of termination of the petitioner, but no approval has reached the Managing Committee before termination was taken place, this Court answers question No. (ii) by holding that the order of termination involving the petitioner is bad in view of non-compliance of the statutory provision under Section 10-A(1)(a) of the Orissa Education Act, 1969.

Now coming to answer the question Nos. (iii) & (v), as prepared by this Court and as reproduced hereunder:

"(iii) Since the termination involved major penalty, whether it requires an inquiry before imposition of the major penalty of termination?

(v) Whether the long and unauthorized absence of the petitioner will be treated as willful abandonment of service?"

From the fact narrations, made hereinabove, this Court finds even though the petitioner remained absent for a good length of time, in view of the admitted position of his prolonged illness and after recovering from his illness ultimately from Hinduja Hospital, Bombay, it appears the petitioner had submitted his joining report before the Management on 5.11.1993. Since the petitioner has submitted a joining report ultimately his case cannot be treated as a case of abandonment of service. Looking to the materials available on record, this Court finds the Management has taken up the issue involving the petitioner thrice. After his submission of the joining report at the first instance, the Governing Body in its sitting dated 21.11.1998 vide Resolution No. 4 unanimously authorized the Principal-cum-Secretary of the College to terminate the appellant on the premises of abandonment of service. This matter was being investigated by the Director and as appearing from paragraph- 11 of the counter submitted by the opposite party Nos. 1 and 2 in the Tribunal, it appears that the matter was under investigation of the Director. Even there has been a correspondence from the Director side for providing instruction and materials and for this, this Court observes that the matter is still pending. In a further development of the matter, the Managing Committee once again referred the matter to the sub-Committee and the petitioner was only asked to file a representation before the Sub-Committee. The sub-Committee again recommended for termination of service of the petitioner following the resolution of the Governing

Body on 25.2.2001 formally resolving unanimously to terminate the service of the petitioner with effect from 29.9.1994. There is no dispute that the order of termination is a major penalty. From the above narrations, it is amply clear that since the proceeding involved a major penalty, such proceeding should not have been culminated in absence of an inquiry. Consequently, this Court holds both the questions in favour of the petitioner and observes that there should have been an inquiry before passing such termination order.

Now coming to answer the question No. (iv), the question reads as follows:

"(iv) Whether the inherent power conferred on the Tribunal under Rule 26 of the Orissa Education Tribunal Rule, 1977 can be converted to an application of review?"

Provision contained in Rule 26 of the Orissa Education (Tribunal), Rule 1977 reads as follows:

"26. Inherent Powers-The Tribunal may exercise inherent powers for the ends of justice as contemplated under Sections 151, 152 and 153 of the Code of Civil Procedure."

Looking to the fact narration involved in the present case, this Court finds that the dispute involved here does not fall within the provision contained in Sections 151, 152 and 153 of the Code of Civil Procedure and therefore, entertaining such application is per se impermissible and the application of inherent power should be confined to only to the extent of lack of jurisdiction as well as the minor corrections bonafidely omitted or committed and not beyond that.

9. Looking to a decision of this Court rendered in the case of Gopinath Deb v. Budhia Swain, , 54 (1982) CLT 515, the view of this Court is that the power of review of a court is also of very limited nature. The submission of Sri Das finds support from the aforesaid decision where this Court in a Division Bench has categorically held that neither the Court nor Tribunal can review its own decision unless it is permitted to do so by statute. It is in this view of the matter and the settled legal position, this Court answers this question in favour of the petitioner and holds that the impugned order vide Annexure-5 is passed in excess of jurisdiction and authority available with the Tribunal.

10. Under the above circumstances, particularly in view of the findings arrived at this Court being inclined to interfere in the impugned order, sets aside the order passed in Annexure-5. Consequently also sets aside the impugned under Annexure-3. While holding the termination of the petitioner in absence of an inquiry as well as in absence of following the mandatory provisions contained in Section 10-A(1) of the Orissa Education Act, 1969 as bad in law, in view of the passing of sufficient time at least about 23 years time in the meantime, this Court instead of remitting the matter back to the authority for conducting an inquiry, directs reinstatement of the petitioner into service. In the case of Tapash Kumar Paul v. BSNL & ANR, , (2014) 4

S.C.R. 875 in paragraph 23 and 24, the Hon''ble Apex Court held as follows:

"23. A somewhat similar issue was considered by a three Judge Bench in Hindustan Tin Works (P) Ltd. v. Employees of M/s. Hindustan Tin Works Pvt. Ltd. & Ors. in the context of termination of services of 56 employees by way of retrenchment due to alleged non-availability of the raw material necessary for utilisation of full installed capacity by the petitioner. The dispute raised by the employees resulted in award of reinstatement with full back wages. This Court examined the issue at length and held:

"It is no more open to debate that in the field of industrial jurisprudence a declaration can be given that the termination of service is bad and the workman continues to be in service. The spectre of common law doctrine that contract of personal service cannot be specifically enforced or the doctrine of mitigation of damages does not haunt in this branch of law. The relief of reinstatement with continuity of service can be granted where termination of service is found to be invalid. It would mean that the employer has taken away illegally the right to work of the workman contrary to the relevant law or in breach of contract and simultaneously deprived the workman of his earnings. If thus the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk his responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Speaking realistically, where termination of service is questioned as invalid or illegal and the workman has to go through the gamut of litigation, his capacity to sustain himself throughout the protracted litigation is itself such an awesome factor that he may not survive to see the day when relief is granted. More so in our system where the law''s proverbial delay has become stupefying. If after such a protracted time and energy consuming litigation during which period the workman just sustains himself, ultimately he is to be told that though he will be reinstated, he will be denied the back wages which would be due to him, the workman would be subjected to a sort of penalty for no fault of his and it is wholly undeserved. Ordinarily, therefore, a workman whose service has been illegally terminated would be entitled to full back wages except to the extent he was gainfully employed during the enforced idleness. That is the normal rule. Any other view would be a premium on the unwarranted litigative activity of the employer. If the employer terminates the service illegally and the termination is motivated as in this case viz. to resist the workmen''s demand for revision of wages, the termination may well amount to unfair labour practice. In such circumstances reinstatement being the normal rule, it should be followed with full back wages. Articles 41 and 43 of the Constitution would assist us in reaching a just conclusion in this respect. By a suitable legislation, to wit, the U.P. Industrial Disputes Act, 1947, the State has endeavoured to secure work to the workmen. In breach of the statutory obligation the services were terminated and the termination is found to be invalid; the workmen though willing to do the assigned work and earn their livelihood, were kept away therefrom. On top of it they were forced to litigation

up to the Apex Court now they are being told that something less than full back wages should be awarded to them. If the services were not terminated the workmen ordinarily would have continued to work and would have earned their wages. When it was held that the termination of services was neither proper nor justified, it would not only show that the workmen were always willing to serve but if they rendered service they would legitimately be entitled to the wages for the same. If the workmen were always ready to work but they were kept away therefrom on account of an invalid act of the employer, there is no justification for not awarding them full back wages which were very legitimately due to them.

* * *

In the very nature of things there cannot be a straitjacket formula for awarding relief of back wages. All relevant considerations will enter the verdict. More or less, it would be a motion addressed to the discretion of the Tribunal. Full back wages would be the normal rule and the party objecting to it must establish the circumstances necessitating departure. At that stage the Tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reason for exercising discretion must be cogent and convincing and must appear on the face of the record. When it is said that something is to be done within the discretion of the authority that something is to be done according to the rules of reason and justice, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular."

After enunciating the above noted principles, this Court took cognizance of the appellant''s plea that the company is suffering loss and, therefore, the workmen should make some sacrifice and modified the award of full back wages by directing that the workmen shall be entitled to 75% of the back wages.

24. Another three-Judge Bench considered the same issue in Surendra Kumar Verma & Ors. v. Central Government Industrial Tribunal-cum-Labour Court, New Delhi & Anr. and observed:

"... Plain common sense dictates that the removal of an order terminating the services of workmen must ordinarily lead to the reinstatement of the services of the workmen. It is as if the order has never been, and so it must ordinarily lead to back wages too. But there may be exceptional circumstances which make it impossible or wholly inequitable vis-�-vis the employer and workmen to direct reinstatement with full back wages. For instance, the industry might have closed down or might be in severe financial doldrums; the workmen concerned might have secured better or other employment elsewhere and so on. In such situations, there is a vestige of discretion left in the court to make appropriate consequential orders. The court may deny the relief of reinstatement where reinstatement is impossible because the industry has closed down. The court may deny the relief of award of full back wages

where that would place an impossible burden on the employer. In such and other exceptional cases the court may mould the relief, but, ordinarily the relief to be awarded must be reinstatement with full back wages. That relief must be awarded where no special impediment in the way of awarding the relief is clearly shown. True, occasional hardship may be caused to an employer but we must remember that, more often than not, comparatively far greater hardship is certain to be caused to the workmen if the relief is denied than to the employer if the relief is granted."

Therefore, in the light of the decision of this Court in Deepali Gundu''s case (supra) which has correctly relied upon higher bench decisions of this Court in Surendra Kumar Verma''s case (supra) and Hindustan Tin Works Pvt. Ltd. (supra), I am of the opinion that the appellant herein is entitled to reinstatement with full back wages since in the absence of full back wages, the employee will be distressed and will suffer punishment for no fault of his own."

11. Thus while setting aside the impugned order vide Annexures-3 and 5, this Court directing for reinstatement of the petitioner to his post of Librarian forthwith, following the decision of the Hon''ble Apex Court referred to hereinabove also directs the opposite party Nos. 1 and 2 to pay the petitioner his entire back wages from the date of submission of his joining report on 05.11.1993 along with interest at the rate of 6% per annum all through and also continuity of service. The direction for payment of back wages be worked out and made over to the petitioner within a period of six weeks.

12. The writ petition is thus allowed. However looking to the injustice and harassment made to the petitioner, this Court also awards cost of Rs. 3000/- (Rupees Three thousand) to be paid to the petitioner by opposite party Nos. 1 and 2 within one month.