
(2018) 07 CAL CK 0152

Calcutta High Court

Case No: Writ Petition No. 25138 (W) of 2005

Uttam Kumar Saha

APPELLANT

Vs

State of West Bengal &
Ors

RESPONDENT

Date of Decision: July 27, 2018

Acts Referred:

West Bengal State Electricity Board Employees' Service Regulations "Rule 31(i)(iii)"#Constitution of India, 1950 "Article 12, 14, 16, 16(1), 21, 226

Citation: (2018) 07 CAL CK 0152

Hon'ble Judges: AMRITA SINHA, J

Bench: Single Bench

Advocate: K.K. Maitra, A.R. Lahiri, M.K. Das, Debayan Bera, Sujit Sankar Koley, Ranjay De, B. Banerjee

Final Decision: Disposed Off

Judgement

Amrita Sinha, J.

The petitioner was working as Operating Assistant (Mechanical Wing) under Bandel Thermal Power Station (in short "BTPS"), under West

Bengal State Electricity Board (in short "WBSEB") since 21st October, 1985. On 24th May, 1989 the petitioner met with a serious accident while

he was on duty. He underwent treatment in the BTPS Hospital on and from 24th September, 1989 till the end of July, 1989.

The petitioner was examined by the medical board of WBSEB on 2nd April, 1991. On the recommendation of the medical board the petitioner was

placed under 'Below medical category' for a period of three months by the order of the Director Personnel, WBSEB vide Office order No-

C/IR/L.M.C/113 dated 21st December, 1991. Vide office order No. 08/91 dated 19th December, 1994, the petitioner was diverted to his original place

of deployment at mechanical operation wing BTPS with immediate effect until further orders in the interest of Board's work.

The petitioner started absenting from his duty without intimation on and from 12th January, 1995. The petitioner was examined by the medical board of

the WBSEB on 14th March, 1995, when the board opined that there had been no objective deterioration in his health and he may be put back to his

normal duty. The petitioner made a representation on 3rd April, 1995 before the General Manager, BTPS requesting him to permit him to perform light

duty till he was declared fit for active technical job. His prayer was turned down vide a letter dated 29th September, 1995 issued by the Chief

Personal Manager.

Vide memo dated 6th /10th January, 2000, a letter was issued in favour of the petitioner from the office of the General Manager, BTPS advising him

to vacate his quarter within fifteen days from the date of receipt of the letter failing which action for eviction will be taken. In the said letter the

petitioner was informed that he had been terminated from his service with effect from 11th January, 1997. The petitioner made a representation

before the Secretary, WBSEB on 16th May, 2000 requesting them to reinstate him in service with full salary and other benefits for the period of his

forced unemployment. He further mentioned that the letter of termination made by him on 1st July, 1997 be treated as withdrawn. The petitioner made

further representation to the above effect on 6th October, 2001. A copy of the aforesaid representation was also forwarded to the labour

commissioner for raising an industrial dispute but thereafter the petitioner did not proceed with the same.

In the writ petition it has been further stated that the petitioner was admitted in the Christian Medical College, Vellore in January, 2005 for treatment

which continued for a prolonged period. The writ petition had been affirmed on 23rd December, 2005. It is the specific case of the petitioner that the

order of termination was never served upon the petitioner and he was not aware of the same. The petitioner got the knowledge of the termination or

der only when the letter for vacating the quarter was served upon him. The order of termination has been annexed with the affidavit in opposition filed

on behalf of the respondent No-2.

The petitioner submits that the order of termination of service under regulation 33 (1) (iii) of West Bengal State Electricity Board Employees' Service

Service Regulations (in short "WBSEBESR") is bad in law being contrary to the principles of natural justice, equity and fair play. Automatic

termination without conducting any disciplinary proceeding is not maintainable. The same is in violation of the provisions of Article 14, 16 and 21 of the

Constitution of India. The learned advocate refers to the decisions of The State of Assam & Ors. vs. Akshaya Kumar Deb reported in AIR 1976 SC

37, The Manager Government Branch Press & Anr. vs. D.B. Billiappa reported in AIR 1979 SC 429, D.K. Yadav vs. J.M.A. Industries Limited

reported in (1993) 3 SCC 259, Uptron India Limited vs. Shammi Bhan & Anr. reported in AIR 1998 SC 1681, Assam Sanmilita Mahasangha & Ors.

vs. Union of India & Ors. reported in AIR 2015 SC 783, Chittaranjan patra vs. State of West Bengal & Ors reported in 1991 (1) CLJ 463 in support

of his case.

The respondent no. 2, West Bengal State Electricity Distribution Company Limited (in short "WBSEDCL") filed affidavit in opposition stating that

the case of the petitioner was taken up for consideration by the medical board on 15th February, 1996 when the petitioner was directed to remain

present for examination. The petitioner was absent. It was further stated that vide memo dated 2nd May, 1996, the petitioner had been intimated that

his prolonged absence from duty without any intimation tantamount to misconduct and breach of discipline and his services are terminable in terms of

Rule 31 (i) (iii) WBSEBESR. The petitioner had been advised to report for duty forthwith and appear before the medical board as and when intimated.

As the petitioner did not report to duty accordingly vide office order dated 11th September, 1997 his services were deemed to be terminated with

effect from 11th January, 1997 owing to his continuous absence from duty exceeding two years with effect from 12th January, 1995 in terms of

Regulation 33 (i) (iii) of WBSEBESR. The petitioner submitted a letter dated 01-07-1997 to the Chairman WBSEB intimating that he was resigning

from service due to his illness. Request had been made to treat the same at most urgent. Copy of the resignation letter dated 1st July, 1997 written by

the petitioner to the Chairman WBSEB had been annexed at page 18 of the affidavit-in-opposition.

It has been submitted that the petitioner had been duly terminated in accordance with the prevailing rules relating to prolonged absence from duty

without any intimation. It is further submitted that the petitioner has approached this court at a very belated stage and the writ petition is liable to be

dismissed on the ground of inordinate delay. He also submitted that there is a provision for alternative remedy and without availing the same the

petitioner rushed to the writ Court. The petitioner approached the labour commissioner but thereafter did not proceed with the case.

At the time of hearing of this case it has been pointed out by Mr. Bera learned advocate representing the respondent WBSEDCL that West Bengal

Power Development Corporation Ltd. (in short "WBPDC") has taken over charge of the respondent No.3 BTPS where the petitioner was

working prior to his termination. Vide order dated 15th. June 2018 this court granted leave to the petitioner to add WBPDC as party respondent in

the matter and to serve a copy of the writ petition upon it. WBPDC has entered appearance and is represented by its counsel.

It has been submitted by WBPDC that vide notification No. 558-Power/IV dated 28th. June 2001 WBSEB was directed to make over BTPS with all

assets and liabilities to WBPDCCL on and from 1st. April 2001. In clause 4 (b) of the said notification it has been mentioned that "All suits, cases or

arbitration proceedings pending in any court and any arbitrator relating to the generating stations (BTPS and STPS) against the Board shall with effect

from the date of the notification, be deemed to have been instituted against the generating company (WBPDCCL) and the generating company

(WBPDCCL) shall be instituted in place of the Board. It has been submitted that since the termination and any other cause of action if any, arose

before 1st. April 2001 and as no suit or case was pending by and between the parties on the appointed date i.e, 1st. April 2001 accordingly WBPDCCL

does not have any liability in respect of the petitioner. Any order passed in the instant case is to be executed by WBSEDCL and not by WBPDCCL.

After hearing extensive submissions made on behalf of the parties it appears that the petitioner was serving at BTPS since 1985 and there was no

complaint against him. While on duty on 24-05-1989 he met with a serious accident resulting in grave injuries in his head and backbone. He was

hospitalised in BTPS hospital for nearly two months. The petitioner however did not recover fully and was not in a position to perform regular work.

He was examined by the medical Board of WBSEB and was placed under low medical category for three months and thereafter reverted to his

original place of deployment. Requests made by the petitioner to allot him light job was not acceded. As the health of the petitioner did not permit him

to do the work that he was allotted the petitioner started absenting from his duty on and from 12-01-1995. He did not even appear before the medical

Board for examination. The respondent vide memo dated 02-05-1996 intimated the petitioner that his prolonged absence from duty without intimation

tantamount to misconduct and his services were terminable in case of continuous absence exceeding two years. As the petitioner did not resume his

duties WBSEB vide memo dated 11-09-1997 intimated the petitioner that he shall be deemed to be terminated from 12-01-1995. But none of the above

two notices were served upon the petitioner. In the meantime the petitioner vide his letter dated 01-07-1997 tendered his resignation.

The documents dated 02-05-1996 and 11-09-1997 issued by WBSEB has been annexed in the affidavit in opposition. The petitioner in his reply has

categorically denied receiving those documents. The respondent has not been able to show any proof of service of the said two documents upon the

petitioner. The respondent in paragraph 12 of the affidavit in opposition admitted receiving the letter of resignation of the petitioner and has further

admitted that they did not take any steps pursuant to the said letter.

From the above it follows that neither the memo advising the petitioner to resume duties nor the memo intimating the petitioner about his deemed

termination was duly served upon the petitioner. The petitioner got the knowledge of his deemed termination only when the authority directed the

petitioner to vacate the quarter vide memo dated 06/10-01-2000. This shows that even though the respondent terminated the service of the petitioner

with effect from 11th. January 1995 but till January 2000 they did not take any steps to remove the petitioner from his service quarter.

The petitioner on the other hand made two representations, one on 16-05-2000 and the other on 06-10-2001 and thereafter filed the instant writ petition

on 23-12-2005. In the entire writ petition there is no averment whatsoever mentioning the reasons for such inordinate delay in filing the instant writ.

Apart from a bald stereotype statement that the petitioner is not guilty of any wilful laches the petitioner has not mentioned the cause as to why the

petitioner approached the writ court after a period of nearly six years after receipt of the memo dated 06/10-01-2000.

Vigilantibus, non dormientibus jura subveniunt i.e, the vigilant and not the sleepy is assisted by law. The petitioner has literally slept over his rights. He

absented himself from his duty without any intimation for years together. He filed the writ petition after a period of nearly six years from the date the

alleged cause of action arose. The conduct of the petitioner clearly shows that he was not at all vigilant to safeguard his right. At the same time the

respondent also did not bother to take proper steps at the right time. The respondents did not care to serve the notice to resume duties or the notice of

deemed termination upon the petitioner. Even after termination of service of the petitioner with effect from 11th. January 1995 the respondents

allowed the petitioner to enjoy the service quarter till 2000 or maybe thereafter. Both the parties were equally negligent in their conduct.

At this stage what is to be decided is whether the deemed termination of the petitioner was valid in the eye of law and if not, then what relief is the

petitioner entitled to keeping in mind the delay on the part of the petitioner in approaching the writ court. It is well settled that the courts should not

adopt an injustice-oriented approach by rejecting petitions on the ground of delay. However, the court while allowing such petition has to draw a

distinction between delay for want of bona fides and delay due to negligence. The conduct, behaviour and attitude of a party relating to its inaction or

negligence to approach the court in proper time are relevant factors to be taken into consideration. The fundamental principle is that the courts are

required to weigh the scale of balance of justice in respect of both the parties and exercise discretion judiciously for dispensing substantial justice.

It is evident that as long as the petitioner was healthy he performed his duty regularly but due to the accident that he met while on duty he became

physically weak and lost his ability to perform. He consistently requested the authorities for a lighter job but the same was refused. To prevent further

deterioration of his health the petitioner started to abstain himself from his duty. Out of sheer frustration the petitioner submitted his resignation letter

wherein he specifically mentioned that all his dues accumulated in his account may be donated to the relief fund of the Chief Minister of West Bengal.

It seems that the petitioner lost all hopes of recovering and took the ultimate decision to resign. In fact it has been averred that he went to Vellore and

got admitted in the Christian Medical College in January 2005. He underwent an operation at Vellore and had to be admitted in the hospital for a long

time.

Thus it transpires that the life of the petitioner suffered a major setback and his service career came to a halt due to the accident faced by him while

on duty. He became physically weak and financially broke. As a last resort he made a representation before the concerned authority on 16-05-2000

and 06-10-2001 requesting him to treat his letter of resignation as withdrawn and reinstate him in service. Regulation 33 (1) (iii) of WBSEBESR

states:-

“Unless otherwise specified in the appointment order in any particular case, the service of a permanent employee of the Board may be terminated

without notice if he remains absent from duty, on leave or otherwise for a continuous period exceeding two years.

Admittedly, the petitioner remained absent from duty without intimation continuously for a period exceeding two years but the question arises that can

he be removed automatically without notice. Can an employee be removed from service without initiating any proceeding against him? Will the same

not be hit by the principles of natural justice, equity and fair play? The Supreme Court in the case of D.K.Yadav vs J.M.A Industries Ltd. reported in

(1993) 3 SCC 259 held that where the Rule provided that the services of an employee who overstays the leave would be treated to be automatically

terminated, would be bad as violative of Articles 14, 16 and 21 of the Constitution. It was further held that if any action was taken on the basis of such

a Rule without giving an opportunity of hearing to the employee, it would be wholly unjust, arbitrary and unfair. The Court held in no uncertain terms

that the principles of natural justice would have to be read into the provision relating to automatic termination of services. It further held that right to

life enshrined under Article 21 include right to livelihood. Before taking any action putting an end to the tenure of an employee, fair play requires that a

reasonable opportunity to put forth his case is given and domestic enquiry conducted complying with the principles of natural justice.

The aforesaid principles had been reiterated in the case of Uptron India Ltd. vs Shammi Bhan and Anr. reported in AIR 1998 SC 1681 relied upon by

the petitioner. It had been clearly held that the principles of natural justice which have to be read into the offending clause must be complied with and

the employee must be informed of the grounds for which action was proposed to be taken against him. The court opined that the clause providing

automatic termination of service of a permanent employee would be bad if it does not purport to provide an opportunity of hearing to the employee

whose services are treated to have come to an end automatically.

In the case of *The Manager, Government Branch Press and anr. vs D.B.Belliappa* reported in AIR 1979 SC 429 the Supreme Court held that an

arbitrary invocation or enforcement of a service condition terminating the service of a temporary employee may itself constitute denial of equal

protection and offend the equality clause in Articles 14 and 16 (1). The same proposition had been reiterated in the case of *The State of Assam and*

others vs Akshaya Kumar Deb reported in AIR 1976 SC 37 and *Chittaranjan patra vs. State of West Bengal & Ors* reported in 1991 (1) CLJ 463. In

the case of *Assam Sanmilita and others vs Union of India and others* reported in AIR 2015 SC 783 the Supreme Court held when it comes to the

violations of fundamental rights of life and personal liberty, delay or laches would not by itself without more would not be sufficient to shut the doors of

the court on any petitioner.

The learned Advocate for the respondent no. 2 distinguished the ratio of the above judgments and relied upon the case of *State of Jammu and*

Kashmir vs. P.K. Zalpuri & Ors. reported in (2015) 15 SCC 602 wherein the Hon'ble Supreme Court held that stale claims should not be

adjudicated unless the same causes grave injustice. The staleness of the claim remained stale and it could not have been allowed to rise like a phoenix

by the writ Court. The grievance agitated by the respondent did not deserve to be addressed on merits, for doctrine of delay and laches had already

visited his claim like the chill of death which does not spare anyone, even the one who fosters the idea and nurtures the attitude that he can sleep to

avoid death and eventually proclaim "Deo-gratias" "Thanks to God".

The ratio which follows from the above judgments is that as held in AIR 2015 SC 783, even though there is no period of limitation for filing petition

under Section 226, the petitioner should approach the Court without loss of time and in case there is any delay then cogent explanation should be

offered for the same. No hard and fast rule can be laid down and no straight jacket formula can be adopted for deciding whether or not a Court should

entertain a belated petition. The question is one of discretion and each case must be decided on its own facts.

In the instant case, the petitioner's life got shattered due to an accident while on duty. Snatching away his livelihood on account of his physical

weakness would be sheer injustice to him. Proper notice had to be issued in favour of the petitioner giving him an opportunity to explain his conduct.

The respondent being "State", within the meaning of Article 12 ought to be reasonable and should take care about the welfare of its employees.

Being aware of the fact that the petitioner had suffered serious injury at his work places the respondents did not permit him to perform light work in

spite of repeated requests made by the petitioner. Instead of putting up a human face, the respondents behaved with a step motherly attitude and

practically forced the petitioner to perform such work which his health did not permit, leaving him with no other alternative but to abstain himself from

work to save himself from further pain and suffering. The petitioner must have spent a considerable sum of money for his treatment and medication as

it has been stated that even in the year 2005 the petitioner had to undergo operation at Christian Medical College, Vellore. Possibly after returning

from Vellore the petitioner recovered from his ailment and then approached the writ Court for relief.

In my considered opinion, in the backdrop of the instant case the delay in filing the writ petition is liable to be condoned for ends of substantial justice.

It will be serious miscarriage of justice if the case at hand is shut out on the ground of delay. I am also not convinced with the argument forwarded by

the learned advocate for the respondent that the writ petition is liable to be dismissed on the ground of availability of alternative remedy. Deemed

automatic termination of the service of the petitioner without notice and without affording an opportunity of hearing is contrary to the principles of

natural justice, equity and fair play and in violation of the provisions of Article 14, 16 and 21 of the Constitution of India.

The same is bad and not sustainable in the eye of law. The order of deemed suspension of the petitioner with effect from 11th. January, 1997 passed

vide office order No- C/IR/95 dated 11th September, 1997 is set aside and quashed. The petitioner is liable to be reinstated in service. The petitioner

had been absenting from his duty on and from 12th January, 1995 due to his physical ailment. The instant writ was filed in the year 2005. The

petitioner is approximately 56-57 years of age at present and he has hardly 3-4 years of service left to attain his age of superannuation.

In view of the above, justice would be sub served if the respondent no. 2 is directed to take steps to refer the petitioner before the medical board to

assess his physical health within a period of six weeks from the date of receipt of a copy of this order and thereafter allot such work to the petitioner

as his health would permit. I order accordingly. The petitioner relies upon judgments wherein direction for payment of back wages had been issued at

the time of reinstatement. Writ court is a court of equity and the conduct of the party is an important factor to be taken into account for exercising the

discretion. It is well-settled that High Court's discretionary power under Article 226 of the Constitution can be exercised to grant relief only to a

person whose conduct does not disentitle him to obtain such discretionary relief. The petitioner himself approached this court at a very belated stage.

He cannot take advantage of his own wrong and pray for relief in his favour. Admittedly he has not worked on and from 12th. January 1995. Taking

into account the time taken by the petitioner to approach the writ court I am not convinced to exercise my discretion to pass an order for payment of back wages in the instant case.

The petitioner is given liberty to approach the respondent no. 2 by filing representation within a fortnight from date seeking back wages and the said

respondent will consider the case of the petitioner sympathetically and decide the same upon giving a reasonable opportunity of hearing to the

petitioner or his authorised representative and pass a reasoned order within a period of six weeks from the date of filing of such representation by the

petitioner. The petitioner will be entitled to produce all his medical documents in support of his physical ailment. The respondent No-2 will

communicate his order to the petitioner within a fortnight therefrom.

It is made clear that the aforesaid direction is issued upon the respondent no. 2 as the petitioner was an employee of BTPS when the cause of action

arose and prior to the taking over of BTPS by WBPDCCL and as per Clause 6 of the notification dated 28th June, 2001 the employees of the Board

holding posts in BTPS shall exercise option indicating their willingness to be absorbed in WBPDCCL. Non-optees holding posts in generating stations

would be released in phases for their suitable deployment on Board's establishment without hampering Plant Work. It appears that there is no

provision for automatic absorption of BTPS employees in WBPDCCL.

The transfer of personnel from BTPS to WBPDCCL was through selection process based on options received from willing employees for WBSEB

within a specified time limit and according to the vacancies available. Since the petitioner was out of service during the relevant period he did not have

any opportunity to exercise any option. Accordingly, steps should be taken by the respondent no. 2 for acting in accordance with the above direction

and if occasion so arises, then the petitioner may be transferred to WBPDCCL. W.P. No. 25138 (W) of 2005 is disposed of in the light of the

observations made above. No order as to costs. Urgent certified photocopy of this judgement, if applied for, be supplied to the parties or their

advocates on record expeditiously on compliance of usual legal formalities.