

(1999) 10 GUJ CK 0018

In the Gujarat High Court

Case No : Special Civil Application No. 6057 of 1998

B.N. Bhardwaj

APPELLANT

Vs

B.K. Maruthi

RESPONDENT

Date of Decision : 25-10-1999

Acts Referred:

Citation : (2000) 1 GLR 896

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : B.G. Jani, for the Appellant; Darshan M Parikh, Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.Balia, J.—Heard learned counsel for the parties. The petitioner challenges by way of this petition show cause notice dated 15.7.1998 issued by respondent No.1 following his conviction by judicial court u/s 5(1)(d) of Prevention of Corruption Act, 1947 on 30.12.1996. The main plank of the petitioner in his petition as is apparent from the pleadings in the petition as well as the contention of the petitioner noticed at the time of issuing notice in order dated 29.7.1998 is that for the same charges for which petitioner has been convicted, a departmental enquiry was held and major penalty has already been inflicted of reduction in time scale of pay by order dated 18.9.1991. With this premise it was contended that once the petitioner was retired, order of dismissal subsequent thereto on the basis of order of conviction on the very same charges cannot be passed inasmuch as no order of dismissal can be made with retrospective effect and that too for the same charges for which the petitioner already has suffered departmental enquiry. New punishment by the department on conviction on the same charges cannot be once again inflicted on the petitioner. The very same contentions have been urged at the time of hearing on behalf of the petitioner. Learned counsel for the petitioner also drew the attention of the Court to Regulation 20 of the Bank of Baroda Officers Services Regulations 1979

(hereinafter called `Service Regulations`) for urging that Regulation 20(3)(iii) does not authorise the respondents to initiate any disciplinary proceedings after retirement on the basis of post retirement conviction on a criminal charge.

2. It was pointed out by learned counsel for the respondents, replying to contentions raised by learned counsel for the petitioner, that the very foundation of the petitioner's case that the charges under trial before the court under the provisions of Prevention of Corruption Act and the charges enquired into the departmental enquiry are same is not correct. Though neither the charge sheet served on the petitioner in connection with which he was awarded punishment of reduction in time scale of pay nor the charge sheet presented to the court for the purpose of criminal trial by the prosecuting agency has been produced by the petitioner and he has rest contented with his deposition on oath, both documents have been filed along with reply affidavit, copy of which was served on the learned counsel for the petitioner on 9.8.1998 for the purpose of showing that the charges under the criminal trial were distinct from the charges that formed the subject matter of departmental enquiry. Learned counsel for the respondent relied not only on the provisions of Regulation 20 of Service Regulations for the purpose of initiation of post retirement proceeding against an incumbent on the basis of conviction but also on Regulation 43 of the Bank of Baroda Employees Pension Regulations, 1995 (hereinafter called `Pension Regulations`) which inter alia provided that the competent authority may by order in writing withhold or withdraw a pension or a part thereof, whether permanently or for a specific period if the petitioner is convicted of a serious crime or criminal breach of trust or forgery or acting fraudulently or is found guilty of gross misconduct, provided that where a part of pension is withheld or withdrawn the amount of such pension shall not be reduced below the minimum pension per mensem payable under these regulations.

3. It was urged by Mr. Parikh that it is implicit in the Pension in the Regulation that action for withholding or withdrawing a pension can only be made after the retirement of a person on the basis of conviction that may have come later to retirement and withdrawing of a pension as a whole which is ordinarily a concomitant of dismissal or removal from service of the incumbent the show cause notice in question is directly relatable to said Regulation 43 of Pension Regulations. If the court comes to that conclusion that Regulation 20 of Service Regulations does not apply, it should not result in its invalidation merely because of reference to wrong source of power, when in fact power to initiate such proceedings exist otherwise under the Regulations governing pension as conditions of service between the bank and its employees.

4. Learned counsel for the respondent also urged that petitioner is guilty of suppressio veri inasmuch as he has withheld all relevant documents necessary for sustaining the plea of similarity of charges in the criminal case as well as departmental enquiry from the court while filing the petition and founding his claim on that basis.

5. First coming to the factual foundation for the petition having carefully considered the two documents filed along with reply, namely, memorandum of charges against the petitioner by the respondent bank dated 12.4.1988 at Annexure B to the reply and Annexure C the charge sheet submitted by the prosecuting agency before the court, I am of the opinion that the charge of the criminal trial was quite distinct and independent of the charges subject matter of departmental enquiry notwithstanding the fact that the similarity of the incidence of the charges in the matter of receiving illegal gratification by the petitioner as an officer of the bank being present in both the cases. The specific charge subject matter of criminal trial was receipt of illegal gratification of Rs.4000/- from one S.K.Parmar a driver in whose name a loan in the sum of Rs.89300/- was disbursed under the sanction by the petitioner and such illegal gratification was received through Shri S.B.Mahadev of Har Har Mahadev Auto Consultants. On the other hand six articles of charges in the departmental enquiry refer to general conduct of dishonesty and unbecoming of a bank officer in sanctioning the loan only in respect of intermediaries M/s. Harish Automobiles and M/s. Har Har Mahadev Auto Consultants for the purpose of finalising automobile purchases. In the statement of allegations annexed with the charges memo in departmental enquiry leaves no room of a doubt that specific charge of receiving illegal gratification from S.K.Parmar through S.B.Mahadev of Har Har Mahadev Auto Consultants was not the subject matter of enquiry under the departmental enquiry under the charge sheet dated 12.4.1988. The specific incident which was referred to in the details of charges for the purpose of bringing home the charges of general tendency of receiving illegal gratification or dishonest intention of the petitioner in respect of disbursing the loans while he was holding and functioning as a Manager at Asarwa Branch at Ahmedabad in the Departmental Enquiry was with reference to receiving illegal gratification in the sum of Rs.6500 from another borrower Ukabhai Ganeshbhai, for granting him loan of Rs.21300/- for purchase of a vehicle and the illustrative cases mentioned in 5 schedules annexed with charge sheet about different incidents of suspect nature does not have reference to the incident of loan disbursement to Mr. S.K.Parmar and receipt of illegal gratification through S.B. Mahadev in respect thereof. Therefore the very basic premise of the petitioner that the subject matter of charges under the two inquiries was the same is disproved to be otherwise than the assertions made on deposition by the petitioner. Thus the plea for relief on the ground of double jeopardy for the same misconduct cannot be accepted.

6. Regulation 20 of Service Regulations is confined to deemed continuance of service only for the purpose of completing disciplinary proceedings if any which were pending at the time of his retirement. But the said Regulation does not permit initiating proceedings on conviction of criminal charges subsequent to the date of retirement. To this contention learned counsel for the respondents responds with two fold contentions. Firstly he supports the show cause notice under Regulation 20(3) of the Service Regulations on the anvil that since the petitioner has been earlier suspended on the basis of pendency of criminal trial,

which has now resulted in conviction, the suspension must be deemed to be equivalent to institution of disciplinary proceedings against the petitioner during the continuance of service, which could be continued even after retirement by informing the petitioner that he shall be deemed to continue in service for the purpose of imposition of penalty in the proceedings in pursuance of the orders of suspension. Secondly, it was urged by learned counsel for the respondent that at any rate respondents are entitled to withhold or withdraw entire pension or a part thereof whether permanently or for a specific period if the petitioner is convicted of a serious crime or criminal breach of trust or any other grave misconduct. The jurisdiction under Regulation 43 of the Pension Regulations puts at par a retired employee entitled to a pension with an employee who has been dismissed from service disentitling him any pensionary benefits. With this reasoning he supports the substance of the notice in question even if first contention is not acceptable, inasmuch as according to him the effect of any order, if passed in pursuance of impugned notice, ultimately would be in withdrawing the pension wholly or partly; permanently or for a specified period as per the directions in the order that may be passed, which the respondent is fully competent to order under Pension Regulation 43.

7. Learned counsel for the petitioner rejoined that Rules of 1995 being not in force at the time when petitioner retired, cannot govern him, they being not retrospective in operation, and at any rate notice in question cannot be by any reasonable standard be referable to exercise of power under Pension Regulation 43 so as to sustain it as it is.

8. So far as question about the applicability of Service Regulation 20(3) in the facts and circumstances of the present case is concerned, I am of the opinion the contention of petitioner is well founded. Service Regulation 20(3)(iii) reads as under:

"The officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The concerned officer will not receive any pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of retirement benefits till the proceedings are completed and final order is passed thereon except his own contributions to CPF."

9. A perusal of the aforesaid provision clearly indicates that it permits continuance of the proceedings which have been initiated at the instance of the employer and has within the domain to institute and conclude. It does not refer to the proceedings which are initiated by an independent agency and continued in the courts of law. Power to continue disciplinary proceedings initiated by the employer cannot inhere into a right to continued authority for punishing a man in respect of conviction which have not come into existence until retirement. The criminal trial is conducted and is in trial of the courts. The prosecution under Prevention of Corruption Act is initiated by a different prosecuting agency. The

complainant as such does not remain a prosecutor once the cognisance is taken by the court and charges are framed. Power to remove a person from service on conviction for a crime by a competent court is not in pursuance of power exercised by the employer to hold an enquiry and find for itself the misconduct of an employee. Such action arise out of volition of the employer. Its continuance and termination always rest within the domain of the employer. But such control over the proceedings of the court, never rest with him. If he has chosen not to initiate action on his own and decided to continued employment of an incumbent notwithstanding his being subject to criminal trial, and ultimately the person superannuates on reaching the prescribed age, he cannot thereafter be punished by the employer on the outcome of such conviction, in the conduct of which he never was in control unless specifically envisaged under relevant law. He, therefore, under the Regulation which permits deemed continuation in service for continuing departmental proceedings only cannot be related to deemed continuation in service for the purpose of continuing criminal trial. Reliance in this connection on *Union of India and Others Vs. R.K.L.D. Azad*, is misplaced. That was a case in which a provision was specifically enacted under the Army's Act for deemed continuance in service subject to the provision of Act for proceeding in such case. If an ex armymen is found liable to criminal prosecution that empowered the competent authority under the Army Act not only to subject such ex-army personnel to court martial but to make all consequential and ancillary orders under the specific provision of the statute. However, this is not an authority for the proposition that even in the absence of such statutory provisoin, the employer continues to keep authority in the matter of taking action consequent to conviction after the incumbent ceases to be in his employment. Even for retaining jurisdiction to continue departmental enquiry and make orders adverse to an employee after he cease to be in employment requires specific provisions in the Rules.

10. The contention of learned counsel for the respondents that because of the suspension of the petitioner with reference to criminal proceedings in question results in initiation of disciplinary proceedings in which he could have been punished by way of dismissal on criminal conviction is not acceptable. Firstly as a matter of principle suspension itself cannot be equated with initiation of disciplinary proceedings against a person. Suspension may be as a consequence of initiation of disciplinary proceedings or in contemplation of initiation of disciplinary proceedings or it may also be in other circumstances that may be envisaged under the Rules, namely, on being arrested on criminal charge and remaining in custody for more than a prescribed period or being subjected to an allegation of a criminal charge and is facing a criminal trial. The suspension order is consequence of some other proceedings that have come into existence or is contemplated to come in existence later but does not by itself result in initiation of either disciplinary proceedings or of a criminal proceeding. Therefore merely because the petitioner has been suspended it cannot be said that any disciplinary proceedings were initiated against him. Secondly it is an independent exercise of

authority by the employer to initiate disciplinary proceedings. Disciplinary proceedings can come into existence even in addition to and in spite of criminal trial in respect of the very same charges or for different charges. Therefore, it is not possible to accept that merely because petitioner has been suspended during pendency of criminal trial at one stage it amounts to initiation of disciplinary proceedings against him by the employer. Moreover factually also this position is not sustainable inasmuch as admittedly the suspension of the petitioner has long been revoked. At the time of retirement he was not under suspension. Therefore a suspension which has been brought to an end cannot be considered to be equivalent to pending disciplinary proceedings. Under Service Regulation 20 only such departmental proceedings which are pending at the time of retirement could have been continued. Therefore no action as contemplated in the notice could have been initiated with reference to clause 20(3)(iii) of the Service Regulations as was in force when the petitioner retired.

11. Coming to contention about retrospective operation of Regulations of 1995, so far as Regulation 43 of 1995 is concerned, I am of the opinion the same are not retrospective in operation.

12. The fact that power to withhold or withdraw pension can be exercisable after the Rules came into force does not make it retrospective because it operates in cases where facts have come into existence in past on which the provisions can operate. Two are independent powers, viz., power to punish and consequential effect on pension and power to withhold or withdraw pension by disentitling a person of such benefit relating to unsatisfactory conduct during service. A person who has been retired prior to commencement of Regulations 1995 can be subjected to the process of withholding or withdrawing pension prospectively after the commencement of the Pension Regulations if he otherwise falls in the conditions prescribed for withholding or withdrawal of pension. Rule 43 leaves no room of doubt that it is not restrictive in its operation to all the convictions or misconduct which take place after the commencement of Regulations. The very fact that a provision operates on the person who has already retired and is not restrictive to the class of pensioners who retired after the commencement of Rules it must be legitimate to infer that it operates to all classes of retired persons who are receiving pension on the date of commencement of Pension Regulations their pension can be withdrawn wholly or partly if he is convicted of a criminal charge, after retirement. At least there cannot be any doubt about applicability of Regulations to those retired persons who are convicted after the commencement of Regulations. No reasonable ground of distinction can be made between class of retired person as a whole who are drawing pension and are convicted after commencement of Regulations of 1995, in so far as it can affect their pension which they are already drawing on completion of age of superannuation after conviction after commencement of Regulations solely on the date of retirement. Current right to pension is affected on being convicted after commencement of Regulations in same manner in all cases. Provisions are in consonance with general principle that pension is no bounty but is in lieu of

service rendered by an incumbent for a long period as a legitimate reward of rest with economic sustenance. If the incumbent is reaping the rewards of his service rendered to an employer he must also pay penalty for the misconduct committed during continuance of service which disentitles him to this reward of well earned rest. The Regulation clearly envisages this position that where a pensioner is convicted of a criminal charge or is otherwise guilty of misconduct his pension can be withdrawn wholly, or in part thereof permanently or for a specified period depending upon the facts and circumstances decided by the employer.

13. In the present case the conviction on a criminal charge in respect of acts committed by the petitioner while he was in service has come after the commencement of regulation. Therefore the question whether employer will have the same power in case conviction had taken place prior to the commencement of Rules does not arise for consideration. The conviction on a criminal charge, which can justify withholding a pension or withdrawing pension, having come after the commencement of Rules of 1995 merely because petitioner has retired prior to commencement of Regulations of 1995 would not keep him away from operation of Regulations of 1995. I am therefore unable to sustain the objection about applicability of Regulation 43 to the petitioner. The petitioner having been found guilty of charges under Prevention of Corruption Act for accepting illegal gratification by a competent court is subjected to the provisions and right to continued pension can be considered on the ground of unsatisfactory conduct of the petitioner.

14. Therefore the respondents do have necessary authority to act under Rule 43.

15. However, as I come to the conclusion that the respondents have no authority to act for imposing punishment on being convicted of a criminal charge by recourse to Regulation 20(3)(iii) which is applicable only in case where pending disciplinary proceedings have been continued by notice to the petitioner, and the petitioner has been served with a show cause notice by proposing a punishment of dismissal as a result of conviction, the same cannot be sustained as it exists. Though I have further come to the conclusion that independent of Service Regulation 20(3)(iii) under Regulation 43 of Pension Regulations the respondents have independent authority to withdraw pension who is already receiving pension, wholly or partly; permanently or for a specified period on a conviction of a criminal charge, the same can be exercised without having recourse to imposition of penalty, the tenor of notice being wholly in a different tone and does not convey the true nature of proceedings with reasonable clarity, it would not be appropriate to sustain that show cause notice with reference to a provision which is vitally different and operates in different circumstances with reference to Regulation 43.

16. I therefore allow this petition quashing the impugned show cause notice for imposing punishment of dismissal under Regulation 20(3)(iii) with liberty to respondents to initiate appropriate proceedings under Regulation 43 of the Pension Regulations and make appropriate orders after giving opportunity of

hearing to the petitioner.

Rule made absolute.

There shall be no order as to costs.