

(2005) 06 AHC CK 0009

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 23677 of 1991

Devendra Kumar Bajpai

APPELLANT

Vs

Superintendent, Jail Bijnore and U.P. State

RESPONDENT

Date of Decision : 09-06-2005

Acts Referred:

Constitution of India, 1950 — Article 141, 226, 311(2)

Penal Code, 1860 (IPC) — Section 307, 323

Probation of Offenders Act, 1958 — Section 12, 3, 4

Uttar Pradesh Government Servants (Discipline and Appeal) Rules, 1999 — Rule 4, 7, 8

Citation : (2005) 06 AHC CK 0009

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Advocate : P.K. Singh, Rajiv Lodhan Shukla, Sita Ram Singh, Ajit Kumar, Manu Saxena and A.K. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

Shishir Kumar, J.—By means of the present writ petition under Article 226 of the Constitution of India the petitioner has approached this Court for quashing the order of suspension dated 12.10.1983 (Annexure-2 to the writ petition) and a writ of mandamus directing the respondents to continue on the post of Warder and to pay the salary with arrears from the date of suspension with 12% interest and to hold that no moral turpitude attached with Section 323 I.P.C.

2. The fact arising out of the present writ petition is that petitioner was appointed as Warder in the year 1981. In 1982, the petitioner was transferred to Bijnor Jail on the same post. An incident had taken place in the night of 11/12.10.1983 in the jail premises and an F.I.R. was lodged on 12.10.1983 at 8.15 a.m. in the morning. The respondent No. 1 has passed an order of suspension against the petitioner. An investigation was done by the Investigating Officer and the petitioner surrender before the Court and a trial took place and the petitioner was convicted. The appeal filed by the petitioner being Criminal

Appeal No. 21 of 1990 was decided and the appeal of the petitioner was dismissed and the conviction of the learned trial Court u/s 307 I.P.C. has been converted into conviction u/s 323 I.P.C. only. The operative portion of the order passed by the IIIrd Additional District Judge, Bijnor is being quoted below:-

"For the discussion held above, this appeal is hereby dismissed on the aspect of facts. But the finding of conviction recorded by the trial Court u/s 307 of the Indian Penal Code is hereby altered to a finding of conviction u/s 323 of the Indian penal Code. Instead of sentencing them at one to any punishment, I direct that each of the two appellants be released on his entering into a personal bond of Rs. 2000 - with the bond of one surely in the like amount to appear and received sentence when called upon during the period of next two years and in the meantime to keep the peace and be of good behavior. Each of the two is further directed to furnish the said bonds before the trial Court within a period of seven days failing which he shall be liable to undergo rigorous imprisonment for one year only u/s 323 for the Indian penal Code the trial Court shall enforce it after waiting the arrival of desired bonds for seven days from today."

3. Petitioner submits that in spite of the aforesaid judgment, the order of suspension has not been revoked and the petitioner is entitled to get the benefit of Section 12 of the Probation of Offenders Act. The same is being quoted below-

"12. Removal of disqualification attaching to conviction-Notwithstanding anything contained in any other law, a person found guilty of an offence dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law:

Provided that nothing in this section shall apply to a person who after his release u/s 4, is subsequently sentenced for the original offence."

4. Thereafter, departmental proceedings were initiated against the petitioner and his statement as well as that of other witnesses were also taken by the concerned jail authorities. It is borne out from the record that the petitioner is still under suspension and no final orders of termination of services of the petitioner have been passed. The petitioner has been released on probation of good conduct by entering into personal bond of Rs. 2000/- and surety in the like amount. Petitioner after releasing on probation challenge the suspension order by means of the present writ petition. The petitioner submits that a counter affidavit has been filed and the respondents have come out with the case that the petitioner's services were terminated but the petitioner submits that no such order of termination had taken place and neither was there any termination order. The Hon'ble Court vide order dated 2.3.2005 directed the respondent No. 1 to furnish a copy of the termination order to the petitioner within a period of two weeks on an application made by the petitioner. But despite repeated attempts on the part of the petitioner the order of termination has never been furnished to the petitioner. Petitioner submits that in view of the provisions of Probation of Offenders Act, it does not come under the moral turpitude,

therefore, the petitioner is entitled for reinstatement and the order of suspension is liable to be quashed.

5. A counter affidavit has been filed and in the counter affidavit a specific averment has been taken that the petitioner was given an appointment under temporary basis and the petitioner was involved in an offence u/s 307, I.P.C. and in criminal case petitioner was convicted by the Trial Court for five years imprisonment but the Appellate Court has dismissed the appeal and kept the petitioner on probation for a period of two years and in case of failure of the surety an order to this effect was passed to serve out a sentence of four years. It has further been stated in the counter affidavit that during the short tenure the petitioner had been awarded five punishments between 18.11.1981 to 12.10.1983 and the appeal filed by the petitioner had already been dismissed, therefore, it will be deemed that the services of the petitioner has come to an end and the petitioner is not entitled for any reinstatement.

6. On the other hand the petitioner has placed reliance upon a judgment of The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others, and has placed reliance upon Para 12 of the said judgment. Para-12 is being quoted below.

"12. Another point which is closely connected with this question is as to the effect of Section 12 of Act which runs thus:

"Notwithstanding anything contained in any other law, a person found guilty of an offence and dealt with under the provisions of Section 3 or Section 4 shall not suffer disqualification, if any, attaching to a conviction of an offence under such law." It was suggested that Section 12 of the Act completely obliterates the effect of any conviction and wipes out the disqualification attached to a conviction of an offence under such law, this argument, in our opinion, is based on a gross misreading of the provisions of Section 12 of the Act. The words "attaching to conviction of an offence under such law" refer to two contingencies: (i) that there must be a disqualification resulting from a conviction and (ii) that such disqualification must be provided by some law other than the Probation of Offenders Act. The Penal Code does not contain any such disqualification. Therefore, it cannot be said that Section 12 of the Act contemplates an automatic disqualification attaching to a conviction and obliteration of the criminal misconduct of the accused. It is also manifest that disqualification is essentially different in its connotation from the word "misconduct", disqualification cannot be an automatic consequence of misconduct, unless the statute so requires. Proof of misconduct may or may not lead to disqualification, because this matter rests on the facts and circumstances of a particular case or the language in which the particular statute is covered. In the instant case neither Article 311(2) proviso (a) nor Rule 14 (i) of the rules of 1968 contain any express provision that the moment a person is found guilty of a misconduct on a criminal charge he will have to be automatically dismissed from service. Article 311(2) proviso (a) is an enabling provision, which merely dispenses with the

various stages of the departmental inquiry and the show cause notice. Rule 14 despite incorporating the principle of proviso (a) to Article 311(2) enjoins on the disciplinary authority to consider the circumstances of the case before passing any order. Thus, in our opinion, it is a fallacy to presume that the conviction of a delinquent employee simpliciter without anything more will result in his automatic dismissal or removal from service."

7. Further reliance has been placed on a judgment of Supreme Court in *Rajbir Vs. State of Haryana*, and has submitted that an employee who was released on probation was allowed by the Hon'ble Apex Court to be reinstated in service but as submitted that it does not lay down without any ratio to be considered within meaning of Article 141 of the Constitution of India. But as submitted that even the Hon'ble Apex Court has found such a conviction as not being a hurdle for reinstatement in services of an employee.

8. The further reliance has been placed in *The State of Mysore Vs. C.N. Vijendra Rao*, the Hon'ble Apex Court in paragraph 6 has opined that by virtue of suspension order "the physical fact of the respondents continuance in service and lawful at that cannot be wiped out by imagining a punitive state of affairs" and has submitted that as the order of suspension still continues, therefore, the respondents cannot go back and to say that the appointment of the petitioner was on ad hoc and on the advice of the D.G.C. (Criminal), the petitioner was no longer continued in services.

9. The further reliance has been placed by the counsel for the petitioner in judgment reported in *Khem Chand Vs. Union of India (UOI)*, wherein the Hon'ble Apex Court has contemplated the effect of an order of suspension and placed reliance upon para 15 of the said judgment. Further submission of the petitioner is that the "an order of suspension of a Government servant does not put an end to his service under the Government. He continues to be a member of service in spite of the order of suspension."

10. The further submission on behalf of the petitioner is that in view of Para 1136A of the Jail Manual provides that employment or suitable ex convicts on certain posts in jail who are not ineligible under para 210 of the Jail Manual.

11. In view of the aforesaid contention, the petitioner submits that the petitioner will be treated to be continued in service and as has not been legally terminated therefrom, neither was any departmental enquiry against the petitioner has been concluded, the petitioner will be treated continued under suspension and as the suspension of the petitioner is illegal, arbitrary and against the settled principles of law, as such, the same is liable to be set aside.

12. On the other hand the counsel for the respondents has submitted that as there was a strike of prison employees and by local arrangement the petitioner was appointed purely on temporary ad hoc basis as a warder. In the end of 12.10.1983, the petitioner attempted to murder one Ram Kishan Warder during the duty hour. The First Information Report was lodged and the petitioner was tried

and the petitioner and other co-accused were convicted u/s 307 I.P.C. to undergo prison for five years rigorous imprisonment and further with fine of Rs. 1,500/-. The petitioner was suspended on 12.10.1983. The Criminal Appeal filed by the petitioner has been dismissed. It has also been submitted that the petitioner was awarded five punishments between 18.11.1981 to 12.8.1983. After dismissal of Criminal Appeal of the petitioner, an legal opinion was sought from learned D.G.C (Criminal) by the Superintendent District Jail, Bijnor as to whether after conviction, the petitioner should be permitted to continue in service or not. An opinion was given that after conviction the petitioner is not entitled to be retain in service. The opinion given by the D.G.C was acted upon and the same was communicated to the petitioner.

13. It has been submitted on behalf of the respondents that the relief sought in the writ petition cannot be granted as one of the relief in the writ petition is a writ of mandamus directing the respondents to continue the petitioner on the post of Warder and further for salary. It is submitted that as the petitioner has not submitted any representation for redressal of his grievances before the competent authority. It is well settled that writ of mandamus cannot be issued unless and until there is any request. As no request has yet been made by the petitioner, therefore, the prayer for mandamus cannot be granted.

14. So far as quashing the suspension order is concerned as the suspension order is passed against the petitioner only due to the involvement in the criminal case and as per provisions contemplated under Sub-clause 2 of Rule 4 of U.P. Government Servant (Discipline and Appeal) Rule, 1999, it is clear that a government servant may be placed under suspension until termination of all the proceeding relating to criminal charge. It is not disputed that the petitioner was convicted and the criminal appeal filed by the petitioner has also been dismissed, therefore, there is no legal ground to quash the order of suspension.

15. The further argument on behalf of the respondents is that the petitioner is purely temporary ad hoc employee and the services of the petitioner was not satisfactory as he was awarded five punishments during tenure of 18 months service. So far as disciplinary proceedings as contemplated under Rule 7 is concerned, the said procedure is not required to be followed in those cases, where penalty is imposed on a person on the ground of conduct, which has led to his conviction on the criminal charges. On the basis of the legal advise it was decided not to continue the petitioner in service due to conviction in criminal case, therefore, the procedure under Rule 7 is not required to be followed. As per provisions contemplated in Rule 8 of the said Rule any suspension order remains enforce until it is modified or revoked by the competent authority. The competent authority instead of revoking or modifying the order of suspension, decided not to continue the petitioner in service. The order of suspension has automatically merged into termination. Although there is no separate order of termination but as it is clear from the letter dated 15.4.1991 that the competent authority has decided not to permit the petitioner in service, therefore, the same amounts to an

order of termination.

16. The reliance has been placed by the counsel for the respondents reported in State of Uttar Pradesh and Another Vs. Kaushal Kishore Shukla, and has submitted that the Apex Court has clearly held that the case of the temporary employee once the competent authority has decided not to continue the government servant in service, no detail enquiry is required.

17. The further reliance has been placed in Trikha Ram Vs. V.K. Seth and Another, and it has been submitted that no opportunity is required in case of dismissal on the ground of conviction.

18. Further reliance has been placed in Union of India and Ors. v. Bakshi Ram AIR 1991 SC 987 and has submitted that the reinstatement is not required in case of release of an employee on the probation under the Probation of Offender Act and has placed reliance upon para 13 of the said judgment. Para 13 of the said judgment is being quoted below:

"13. Section 12 is thus clear and it only directs that the offender "shall not suffer disqualification, in any, attaching to a conviction of an offence under such law". Such law in the context is other law providing for disqualification on account of conviction. For instance, if a law provides for disqualification of a person for being appointed in any office or for seeking election to any authority or body in view of his conviction that disqualification by virtue of Section 12 stands removed. That in effect is the scope and effect of Section 12 of the Act. But that is not the same thing to state that the person who has been dismissed from service in view of his conviction is entitled to reinstatement upon getting the benefit of probation of good conduct. Apparently, such a view has not support by the terms of Section 12 and the order of the high Court cannot, therefore, be sustained."

19. In 1997, Volume-1 SLR Page 281 it has been ruled out that conviction is a misconduct and release u/s 12 of the Probation of Offender Act cannot protect the dismissal or removal.

20. In view of the settled principle of law, the conviction is a misconduct and no detailed enquiry is required. In case the employee is convicted he cannot be reinstated in service. It has also been submitted on behalf of the respondents that so far as the termination order is concerned, the competent authority has sought opinion and it was provided that the petitioner is not entitled to be retained in service. The opinion was acted upon and the same was served upon the petitioner, therefore, the communication of the petitioner can be treated to be an order of termination. The petitioner being a temporary and was appointed in local arrangement on ad hoc basis has got no right to post, as such, is not entitled for any relief

21. After hearing counsel for the parties and after perusal of the records, it is clear that the petitioner has been convicted and has been given the benefit of

Section 12 of Probation of Offender Act but the petitioner has not been honorably acquitted, therefore, in my opinion it amounts to misconduct and the petitioner is not entitled for reinstatement. From the appointment letter of the petitioner it is clear that the appointment of the petitioner was purely on temporary and ad hoc basis, as such, in view of the well settled principle of law laid down by the Apex Court the petitioner has got no right to post. It is also clear from the record, that between 18.11.1981 and 12.10.1983, five punishments were awarded against the petitioner. It clearly goes to show that the conduct of the petitioner was not satisfactory. As regards the petitioner's contention that as no specific order of termination has been passed, therefore, the petitioner will be treated to be in service.

22. In my opinion, as the petitioner has been convicted and has been given benefit of the Probation of Offender Act, as such, it cannot be said that the petitioner has honorably been acquitted from the criminal charges, which have been levelled against the petitioner. As regards, the order of termination, from the record, it is clear that the communication regarding the opinion of the DGC by the competent authority to the petitioner, is treated to be an order of termination.

23. In view of the aforesaid fact, I am of the opinion that the petitioner is not entitled for any relief, the writ petition is devoid of merits and is hereby dismissed.

24. There shall be no order as to costs.