
(2003) 12 BOM CK 0011

In the Bombay High Court

Case No : Writ Petition No. 2349 of 1992

Diwakar Pundlikrao Satpute

APPELLANT

Vs

Zilla Parishad and Others

RESPONDENT

Date of Decision : 08-12-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 2 ALLMR 404 : (2004) 3 MhLj 151

Hon'ble Judges : V.C. Daga, J;B.R. Gavai, J

Bench : Division Bench

Advocate : M.R. Rajguru, for the Appellant; A.B. Choudhari, for respondent Nos. 1, 4 and 5, for the Respondent

Judgement

B.R. Gavai, J.—The petitioner has approached this Court under Article 226 of the Constitution of India, challenging inter-alia the order passed by Education Officer dated 24-3-1986, by which the absence of the petitioner for the period 1-10-1984 to 31-3-1985 was treated as unauthorised absence and the order passed by the Chief Executive Officer, Zilla Parishad dated 25-2-2000, granting ex-post facto sanction to the aforesaid order, issued by Block Education Officer, the order dated 27-2-1986 issued by the Block Education Officer, thereby imposing penalty of stopping of two increments of the petitioner and the order dated 6-11-1985, issued by Block Education Officer, Panchayat Samiti, Karanja.

2. The Facts in brief, leading to the filing of the present petition, are as under:

That the petitioner was appointed as Primary Teacher, in the year 1960 and had an unblemished record till 1984. The petitioner, was transferred in 1984, from Chandewani to Bondarthana, vide order dated 17-9-1984, by way of "Samayojan" i.e. adjustment/absorption of surplus teacher, from one school to another school. It is the contention of the petitioner, that the transfer by way of Samayojan, could only be done within the Kendra and not to a different Kendra and as such he represented to the Education Officer, making various representations for cancelling the said order. The Education Officer, after due

enquiry, issued directions to the Block Education Officer, Karanja, who by order dated 31-3-1985, cancelled the impugned order dated 17-9-1984 w.e.f. 17-9-1984.

3. The petitioner was imposed a fine of Rs. 20/-, by the Block Education Officer by order dated 6-11-1985, for not preparing the unit-wise and subjectwise plan of the concerned classes. The petitioner, vide show cause notice, dated 31-12-1985 was asked to show cause, as to why the action for stopping one increment should not be taken against him, for non-fulfilment of targets, of Family Planning, meant for the year 1984-85 and 1985-86. The Block Education Officer, Panchayat Samiti, Karanja, vide order dated 27-2-1986 stopped two annual increments of the petitioner, with permanent effect, for having committed dereliction of duty, in achieving the targets of the family planning for past several years.

4. We have heard Shri Rajguru, learned counsel on behalf of the petitioner and Shri A.B. Choudhari, learned counsel on behalf of respondents, No. 1, 4 and 5.

5. Insofar as the first grievance of the petitioner is concerned, learned counsel for the petitioner, submits that, since the impugned order of transfer, dated 17-9-1984 transferring the petitioner by way of Samayojan, was itself cancelled, with retrospective effect, by the competent authority, vide its order dated 25-1-1985, after realising the error committed by it, the respondents ought to have regularized, the alleged absence of the petitioner, for the period 1-10-1984 to 31-3-1985. It is thus submitted, that the action on the part of the respondents, in treating the said period, as unauthorised absence and as leave without pay, vide order 24-3-1986 was unjust and illegal. In support of this contention, the petitioner has relied upon a decision of Division Bench of this Court, in the case of Ramesh Motilal Khandelwal v. Zilla Parishad Akola reported in 1992 (1) Mh.L.J. 325.

6. Insofar as, the second grievance is concerned the petitioner, submits that, the order dated 6-11-1985, by which a fine of Rs. 20/- was imposed, by the Block Education Officer, is clearly without authority of law for want of such punishment having not been provided, under the Discipline and Appeal Rules, applicable to the Zilla Parishad Employees. In his submission such a punishment could not have been imposed, as such order passed in this behalf, is liable to be quashed and set aside.

7. Insofar as, the third grievance is concerned, the petitioner submits that, the order dated 27-2-1986, whereby two annual increments with permanent effect, were stopped is concerned, the same is illegal and bad in law for the following reasons :

a) That the petitioner while working as a Primary Teacher was entrusted with the work of Family Planning, which was not statutory or regular work that could be entrusted to a teacher. The impugned order does not charge him for dereliction of his duties as teacher or for any misconduct as a teacher.

b) That the above action is contrary to the orders published in the Government circular dated 30-12-1988 by the Rural Development Department, Government of Maharashtra, Mantralaya, Bombay-32.

c) No disciplinary enquiry procedure was followed before imposing the above punishment on the petitioner.

d) That the punishment as imposed is higher than what was initially proposed, vide show cause notice dated 31-2-1985.

8. The learned counsel relied on the judgment of the Division Bench of this Court in the case of Chandrakant Damodar Kale Vs. Nagpur Improvement Trust and Another, , in support of the proposition, that the authority, has no jurisdiction to impose punishment higher than the punishment proposed in the show cause notice.

9. The learned counsel has also relied on the judgment of the Madhya Pradesh High Court in the case of S. L. Bhimte v. Managing Director, M. P. Audyogik Kendra Vikas Nigam, Raipur reported in 2 (1992) CSJ (HC) 123 in support of the proposition that, withholding of two increments is a major penalty, and as such could not have been inflicted without holding due enquiry.

10. In reply, Shri A. B. Choudhari, learned counsel for respondents No. 1, 4 and 5, has raised a preliminary objections, that, the petition was not maintainable as the petitioner has alternative efficacious remedy of appeal/revision, before the competent authority and that the petition suffers from delay and laches, as the petitioner has approached this Court in 1992, to challenge the orders passed in the year 1985 and 1986. In his submission, this petition is liable to be dismissed on the ground of delay and laches. Learned counsel relying upon, the judgment of the Apex Court, reported in Abhinavodhanda Vidya Sankarabharti Swamulavaru Vs. Poonapati Ramayogi Reddi and Others, . Shri Choudhari, has specifically invited our attention, to the following observations of the Apex Court:

"After a lapse of about 41/2 years they chose to file a writ petition in the High Court on the technical plea that no notice had been served in the appeal filed by the State, if the Ryots really felt aggrieved by the order of the Assistant Settlement Officer they could have themselves gone up in appeal but they did not do so. As a result of the dismissal of the appeal filed by the State the Ryots were not worse off. The Tribunal had only confirmed the order of the Assistant Settlement Officer. In the circumstances, we are constrained to hold that the Division Bench has committed a manifest error in quashing the order of the Tribunal after a lapse of 41/2 years when the Ryots failed to avail of the alternative remedy open to them."

11. On merits he submits that, the orders impugned are just and proper and need no interference by this Court, under Article 226 of the Constitution. The learned counsel submits that, since the petitioner, has not actually worked, at any of the schools, between the period, from 1-4-1984 to 31-3-1985. Education

Officer, was justified in treating the said period of 182 days as unauthorised absence, by his order dated 24-3-1986.

12. Insofar as, the grievance of the petitioner, regarding penalty of imposing fine of Rs. 20/- is concerned, it is submitted by learned counsel for the respondent No. 1, 4 and 5, that, it was a minor penalty and as such it was not necessary to hold any departmental proceeding for the same.

13. Insofar as, the third grievance of the petitioner is concerned, the learned counsel submits that, by show cause notice dated 31-12-1985, the petitioner was called upon to show cause, as to why his one increment should not be stopped, for dereliction of his duties, in completing Family Planning target, he was directed by the said notice; dated 31-12-1985 to submit his written explanation on 2-1-1986. It is submitted that, in spite of issuance of show cause notice, the petitioner chose not to file any reply and as such acquiesced to the said action. It is therefore, submitted that, no fault can be found, with the order dated 27-8-1986, by which petitioner's two annual increments were stopped.

14. We, propose to first deal with the preliminary objection, raised by Shri Choudhari, learned counsel for respondents. The perusal of the record would reveal that the petitioner has in fact, preferred an appeal to the Divisional Commissioner, vide appeal-memo at Annexure 12 to the petition. However, it appears that the said appeal was not considered by the Divisional Commissioner. Not only this, but thereafter the petitioner, has been continuously making representations to the various authorities, including the State Government. Such of the representations dated 1-7-1988, 29-8-1988, 12-12-1988, 10-7-1990, 19-11-1990 and 9-1-1992 have been annexed to the petition. It therefore, cannot be said that, the petitioner was sitting silent, after the impugned orders were passed. As a fact, the petitioner was approaching various authorities and after having failed to get justice, knocked the doors of this Court, by filing the present writ petition in the year 1992. We therefore, do not think, that the petition deserves to be thrown out on the ground of delay and laches.

15. The decision of the Apex Court, relied upon by the learned counsel for the respondents 1, 4 and 5, in the case of Abhinavodhanda Vidya Sankarabharati (cited supra), in our opinion, would not be applicable, to the facts of the present case. In the said case, the petitioners therein, had chosen not to approach, the High Court for a period of 41/2 years; after the order of the Tribunal was passed, confirming the order of Assistant Settlement Officer. The Apex Court has specifically found that, the petitioner in writ petition, had participated in the proceeding, before the Settlement Commissioner and as such it was not open for them, to approach the High Court, after a lapse of 41/2 years, on a technical plea that no notice had been served, in the appeal filed by the State. In the present case, as stated hereinabove, the petitioner had approached various authorities, for redressal of his grievances and only on failure to get justice, he approached this Court.

16. Even, otherwise, we are not inclined to accept the aforesaid preliminary objection, in as much as, the petition has been filed, in the year 1992 and that the said objection was not taken at the stage of admission of the petition. The petitioner, having waited for 11 long years, to get justice, cannot be non-suited, on a hyper-technical plea. In our opinion, if that is permitted, it would amount to, travesty of justice. Firstly, we find that, factually there is no delay, as the petitioner was pursuing his remedy and secondly, even if there be some delay, this Court can not be precluded from exercising its jurisdiction under Article 226, to entertain a grievance of an affected party. The rule of not entertaining the petition, on the ground of delay and laches, is a rule of circumspection and self-restraint. Even, if there is delay in approaching the Court, this Court is justified in entertaining the grievance, on facts of the case. This view is supported by various judgments of the Supreme Court. We, only refer to readily available recent judgments of the Supreme Court in the case of S.K. Mastan Bee Vs. The General Manager, South Central Railway and Another, and Jawahar Lal Sazawal and Others Vs. State of Jammu and Kashmir and Others, .

17. Coming to the merits of the matter, insofar as the first grievance of the petitioner is concerned, it is undisputed, that, after considering the representations of the petitioner, the respondent - Block Education Officer has cancelled the transfer order, dated 17-1-1984 with retrospective effect, i.e. 17-9-1984, vide his order dated 21-1-1985. The petitioner, vide order dated 31-3-1985 was directed to join at Primary School Nara (Boys). The question, as to whether, the said period of 182 days could be treated as unauthorised absence, is no more res-integra. Relying on the judgment of the Apex Court the Division Bench of this Court in the case of Ramesh Motilal Khandelwal v. Zilla Parishad, Akola reported in 1992(1) Mh.L.J. 325 has observed thus:

"15. The Supreme Court has in the case of Nawabkhan Abbaskhan Vs. The State of Gujarat, held that it is not necessary to obey an order which is illegal and void and without obeying that order, that order can be challenged by the person concerned. In that case the question was whether, the person who was externed should have obeyed the order before challenging it. The Supreme Court held that such an order was illegal and void being in violation of the fundamental rights of the petitioner and, therefore, it was not necessary to obey the same. In the instant case, the order dated 6-12-1985 being contrary to the statutory rules was illegal, and void and, therefore, even assuming that the petitioner did not obey the same and was absent during the intervening period, he would be entitled to the wages for the said period if such an illegal order is set aside. If not, rule 43 in terms, the principles underlying the said rule 43, in our view would clearly be attracted in the present contingency. At any rate, as a general principle of law it is necessary that the State must make good the loss occasioned to the petitioner by reason of its illegal order.

16. It has, therefore, to be held that the petitioner is entitled to wages in his original pay-scale of the post of stenographer although he might have absented

himself during the said period. The leave which is admissible to the petitioner cannot be adjusted during this period. The impugned order dated 20-11-1986, therefore, deserves to be set aside and it has to be held that the Zilla Parishad is liable to pay to the petitioner the wages admissible to him as if the impugned order of transfer dated 6-12-1985 was not passed."

The Block Education Officer, having considered the petitioner's representation, and having realised that, the order dated 17-1-1984, was an illegal order, has himself cancelled, the said order vide order dated 21-1-1985 w.e.f. 17-9-1984. The Block Education Officer vide another order dated 31-3-1985, has directed the petitioner to join at Primary School, Nara (Boys). The order dated 24-3-1986, by which the aforesaid period of 182 days, has been treated, as unauthorised absence and the order dated 25-2-2000, by which the respondent Chief Executive Officer, has granted ex-post-facto sanction, are therefore, not sustainable in the eye of law and liable to be quashed and set aside.

18. Insofar as, the third grievance of the petitioner, regarding stopping of his two increments is concerned; the petitioner by show cause notice dated 31-12-1985 was asked to show cause, as to why his one increment should not be stopped, for not achieving the targets of family planning for the year 1984-85 and 1985-86. However, vide order dated 27-2-1986, the Block Education Officer, imposed a penalty of stopping his two increments. Though, the petitioner, has admittedly failed to reply, to the show cause notice, dated 31-12-1985, still the order, imposing a higher penalty, than the one proposed in the show cause notice, cannot be sustained in law. It is a well settled principle of Administrative law, that the final order, cannot travel beyond the scope of a show cause notice. Such action or order, would be wholly, violative of principles of natural justice.

19. The Constitution Bench of the Apex Court in the case of Bachhittar Singh Vs. The State of Punjab, has observed thus :

"Consequently any action decided to be taken against a Government servant found guilty of misconduct is a judicial order and as such it cannot be varied at the will of the authority who is empowered to impose the punishment. Indeed, the very object with which notice is required to be given on the question of punishment is to ensure that it will be such as would be justified upon the charges established and upon the other attendant circumstances of the case. It is thus wholly erroneous to characterise the taking of action against a person found guilty of any charge at a departmental enquiry as an administrative order."

Their lordships of the Apex Court, in the case of State of U.P. Vs. Vijay Kumar Tripathi, and Another, have held that, before imposition of penalty of censure, it was necessary to give an opportunity to an employee to show cause against the proposed imposition of penalty.

20. Their Lordships of the Supreme Court in the case of Indian Oil Corporation Ltd. v. J. Krishnamurthy, (1997) 11 SCC 467 have observed as under :

"Since a show cause notice was issued by the appellant Corporation requiring the respondent to show cause against the imposition of the penalty of removal from service, the respondent was only required to make his submissions with regard to the imposition of the proposed penalty of removal from service. In these circumstances, the disciplinary authority erred in imposing the higher punishment of dismissal from service on the respondent.

5. Since the respondent was aware that the penalty of removal was proposed against him and he had the opportunity to make his submissions against the said penalty and he availed of that opportunity, it cannot be said that he would suffer any prejudice if the penalty that has been imposed on the respondent under the order dated 21-1-1986 is altered from dismissal to removal from service and the order dated 21-1-1986 is read as an order imposing the penalty of removal from service."

21. The Division Bench of this Court in the case of Chandrakant Damodar Kale Vs. Nagpur Improvement Trust and Another, has also, reiterated the view, that an authority has no jurisdiction, to inflict a punishment, higher than the punishment for which the show cause notice was issued.

22. In view of the settled position of law, we have no hesitation, to hold that the order dated 27-2-1986 imposing a penalty of withholding of two increments, permanently, is bad in law, being violative of principles of natural justice. Though, the petitioner, has not replied, to the show cause notice, dated 31-12-1985; the punishment proposed, in the said show cause notice, was only, stopping of one increment and as such the petitioner could not have been awarded penalty higher than the one, which was proposed in the show cause notice issued to him. In the facts and circumstances, of the case therefore, the penalty imposed by order dated 27-2-1986, will have to be modified and the penalty of stopping two increments will have to be reduced, to stopping of one increment, only. Learned counsel for the petitioner, relying on the Judgment of the Division Bench of the Madhya Pradesh High Court, in the case of S.L. Bhimte v. Managing Director, M.P. Audyogik Kendra Vikas Nigam, Raipur (cited supra) submitted that, since the withholding of two increments is a major penalty, which has been inflicted without holding due enquiry, the entire order withholding two increments should be set aside. However, since the petitioner has chosen, not to reply to the show cause notice, we are not inclined to accept, the prayer of the petitioner, for setting aside the entire order of withholding two increments.

23. Insofar as the order dated 6-11-1985 thereby imposing the penalty of Rs. 20/- is concerned, since allegations; pertaining to the said order, in the petition; have not been controverted, by the respondents, we are inclined to quash and set aside the said order also.

24. For the reasons stated above, the petition, is thus allowed partly, granting following reliefs in favour of the petitioner.

i) The order dated 24-3-1986, passed by the Education Officer, Zilla Parishad,

thereby, treating the period of 182 days, between 1-10-1984 and 31-3-1985, as unauthorised absence and the order dated 25-2-2000, passed by the Chief Executive Officer, granting ex-post-facto sanction, to the order passed by the Block Education Officer, are hereby quashed and set aside and the respondents are directed to regularise the said period of absence and grant all consequential benefits to the petitioner.

ii) The order dated 27-2-1986 issued by the Block Education Officer, thereby imposing penalty of stopping two increments, is quashed and set aside and the penalty is reduced to stopping of one increment, as was proposed in the show cause notice dated 31-12-1985. The respondents are directed, to recalculate the arrears and pensionary benefits, to the petitioner, on the basis of the reduced penalty.

iii) The order dated 6-11-1985, imposing fine of Rs. 20/- is quashed and set aside.

Rule is made absolute in the aforesaid terms. In the facts and circumstances of the case, no orders as to costs.