

(1991) 01 MP CK 0031
In the Madhya Pradesh High Court
Case No : S.A. No. 1 3 of 1987

Madhu Sudan Gupta

APPELLANT

Vs

State of Madhya Pradesh and Others

RESPONDENT

Date of Decision : 02-01-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1, Order 7 Rule 7
Recruitment and Conditions of Service Rules, 1976 — Rule 12, 13, 14

Citation : (1991) MPJR 167 : (1991) 36 MPLJ 712 : (1991) MPLJ 712

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : N.P. Mittal and K.N. Gupta, for the Appellant; P.D. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

This second appeal is by the plaintiff/appellant whose suit for declaration of his termination from service as illegal and void and for grant of ancillary reliefs was dismissed by the lower appellate Court, reversing the judgment and decree of the trial Court.

The appeal was admitted on 22-4-1987 for final hearing on the following substantial questions of law : -

"(i) Whether the appellant after the order of acquittal passed by the High Court was entitled to be reinstated with continuity of service?

(ii) Whether the denial of salary to the plaintiff by the respondents from 29-9-1976 till he joined on 17-11-1980 was justified?

(iii) Whether the termination of service of the plaintiff-appellant on two occasions without holding a departmental inquiry as contemplated under C. C. S. (Control and Appeal) Rules, 1966, is justified?

(iv) Whether M. P. Employees and Contingency Employees Service Rules are applicable to the plaintiff/appellant in the absence of any order of appointment as contingency employee?"

Material facts leading to this appeal are thus : Initially, the appellant was appointed on 16-10-1961 as Time Keeper in M. P. Public Works Department and was posted at Shivpuri. On 2-6-1962 his services were terminated, being temporary. On 11-9-1962 the appellant was reappointed and worked continuously. On 4-9-1976 the appellant was implicated for an offence of accepting bribe of Rs. 50/- and was tried u/s 161, Indian Penal Code, and Section 5(1)(a) and (b) read with Section 2 of the Prevention of Corruption Act, 1947; as a consequence of his arrest, the appellant's services were terminated by the Executive Engineer vide Ext. P-2 dated 29-9-1976; the appellant was convicted and sentenced to one year's rigorous imprisonment by Additional Sessions Judge, Shivpuri. Against the order of conviction the appellant preferred Criminal Appeal No. 129/1977, which was allowed on 8-5-1980 by a learned Single Judge of this Court, and the appellant was acquitted of the charges. The State of M. P. did not prefer any appeal against this Judgment of acquittal, certified copy of which is Ext.P-1. After the Judgment of acquittal, the appellant approached the department on 26-5-1980 and submitted an application (Ext.P-3) with a photostat Copy of Judgment (Ext.P-1) for reinstating him in service and to pay back wages from 29-9-1976. On 1-11-1980 vide Ext. P-4 the Executive Engineer gave a fresh temporary appointment as Time Keeper, though the appellant joined he objected to this appointment vide Ext.P-5, Ext.P-6 and Ext.P-7 and demanded continuity in service and all arrears of pay with increments. On 1-1-1981 because of the illness of his mother, the appellant went on leave where he also fell ill and sent applications with medical certificates for extending the leave. No refusal was communicated, but on 24-2-1981 vide Ext.D-5 the appellant's services were terminated for remaining absent from duty unauthorisedly by giving one month's notice. Having come to know, the appellant approached the Department and submitted applications and also medical certificates. The appellant was allowed to join his duties, but after some time he was again served with one month's notice (Ext.D-7) dated 12th May 1982 for the reason that the appellant is in habit of remaining absent. It was also stated in Ext.D-7 that the appellant's service record showed that he remained absent from duty on the pretext of illness from 7-1-1981, which showed that the appellant was not interested in serving the Department, and because of the services of the appellant the Department was not benefited. After the expiry of one month, vide order dated 22-7-1982 (Ext. D-8) the appellant's services were terminated as no longer required. The appellant challenged this order of termination by serving a notice u/s 80, CPC (Ext. P-9). and instituted a suit on 13-4-1983 for declaration that his termination is null and void and for ancillary reliefs. In paras 5, 6, and 7 and 8 of the plaint the plaintiff challenged the action of the Department for giving the appellant a fresh appointment after the acquittal from the High Court, and not treating him continuously in service from

the date of termination. i.e., 29-9-1976. and not paying him the arrears of salary with increments for that period.

The respondent/State denied the allegations and contended that as the appellant was a work-charged employee, and under rules in case of arrest of such an employee for an offence there is no provision for suspension, his services were terminated. It was further contended that in the case of a work-charged employee it is not necessary to hold any inquiry before terminating the services of such an employee. It was further contended that though the appellant had sent applications for grant of leave, he was not eligible for leave and there was no valid reason for grant of leave and. as such, the appellant was treated absent for remaining absent from duty unauthorisedly, thus, the appellant's services were terminated after giving him one month's notice, which was in accordance with the appointment order.

The trial Court after appreciation of evidence held the dismissal as illegal and void and granted the declaration to that effect with ancillary reliefs. In appeal the lower appellate Court set aside the judgment and decree of the trial Court, holding that the appellant was not a permanent work-charged employee, as he did not complete 15 years of service on 1-1-1974; hence, his services were rightly terminated on 29-9-1976; after the acquittal from the High Court he was rightly given a fresh appointment on 1-11-1980, and because of the conduct of the appellant, his termination from service after giving one month's notice dated 24-2-1981 cannot be said to be illegal; again when the appellant joined duties on 16-3-1981 and absented himself from 5-4-1981, one month's notice (Ext.D-7) dated 12-5-1982 and the order of termination of services from 22-7-1982 (Ext. D-8) cannot be held to be illegal, as the conduct of the appellant showed that he was not devoted to his duties. It is this judgment and decree which has been challenged in second appeal.

Shri N. P. Mittal, learned counsel for the appellant and Shri P. D. Agrawal, Panel Lawyer for the State, were heard.

To deal with this second appeal a look to the Madhya Pradesh Public Works Department Work-charged and Contingency-paid Employees' Recruitment and Conditions of Services Rules, 1976 (for short, the "Rules") is necessary, which deal with the conditions of service of such work-charged employees. "Contingency-paid Employee" is defined in Section 2(b) which means a person employed for full time in an office or establishment and who is paid on monthly basis and whose pay is charged to "Office Contingencies," excluding the employees who are employed for certain periods only in the year. Section 2(c) defines "Employee" which means a Work-charged Employee or Contingency-paid Employee. Section 2(e) defines "Regular Employees under the State Government" which means Government servants who are in regular employment holding permanent or temporary posts under the State Government as distinct from posts in the Work-charged establishment or posts paid from Contingencies. Section 2(f) defines "Service" which means the Madhya Pradesh Work-charged

and Contingency-paid Employees Service, and Section 2(h) defines "Work-charged Employee" which means a person employed upon the actual execution, as distinct from general supervision of a specified work or upon subordinate supervision of departmental labour, store, running and repairs of electrical equipment and machinery in connection with such work, excluding the daily-paid labour and muster roll employed on the work. Rule 5 deals with classification, number of posts, etc., and Rule 6 deals with categorization, which is quoted below :

"Categorization.- Work-charged and Contingency-paid employees for the purpose of these rules shall be divided into the following two categories :

(i) Permanent, and

(ii) Temporary.

Employees who have been in service for fifteen years or more on the 1st January 1974, shall be eligible for the status of permanent Work-charged or Contingency-paid employees."

Rule 7 deals with recruitment and promotion; Rule 9 deals with seniority list; Rule 12 lays down that the provisions of Madhya Pradesh Civil Services (Conduct) Rules, 1965 shall apply to the members of the service (for short, the "Civil Services Rules"). Besides, in the term "misconduct" as enumerated in the Civil Services Rules, acts and omissions enumerated in Clause (a) to Clause (p) have also been included. Rule 12(e) deals with a misconduct of habitual absence without leave or absence without leave for more than ten days; Rule 13 deals with penalties, and Rule 14 prescribes the procedure for imposing penalties, which reads as under : -

"14. Procedure for imposing penalties.-

(1) No order imposing any of the penalties specified in clause (vi), (vii) and (viii) of Rule 13 shall be passed except after -

(i) the employee is informed in writing, when possible to do so, of the proposal to take action against him and of the allegations on which it is proposed to be taken.

(ii) the employee is, as soon as possible, given an opportunity to explain his position in regard to the allegations made against him.

(iii) Such explanation, if any, is taken into consideration: Provided further that (i), no person shall be dismissed without the order of the Competent Authority and provided further that (2) it shall not be necessary to do so where the Head of the Department finds it necessary to remove an employee from service on the ground of security of the State.

(2) An order in writing referred to in sub-rule (1) shall take effect immediately on delivery to the employee and in the event of refusal by the employee to accept delivery of it affixed on the notice board of the establishment on which he is

borne and such affixing of the same on the notice board will be deemed to have been served on him."

A bare reading of these Rules shows that if services are to be terminated for any of the misconducts as enumerated in Rule 12, then the procedure prescribed in Rule 14 has to be followed, and for that, whether the employee is permanent or temporary, there is no exception. Admittedly, no enquiry either at the time when the services of the appellant were terminated initially on 29-9-1976 or thereafter on 22-7-1982 was held for remaining habitually absent. The Rules do not provide dismissal or termination of service by giving one month's notice. The Madhya Pradesh Civil Services (Classification, Control and Appeal) Rules, 1966 (for short, the "Classification, Control and Appeal Rules") also do not provide dispensing with service by giving one month's notice, but the Rules deal with suspension, nature of penalties, procedure for imposing major penalties etc. Rule 12 of the Classification, Control and Appeal Rules lays down an elaborate procedure for holding an inquiry against a delinquent. Therefore, merely because in the appointment order a right was reserved to dispense with the services of the appellant after giving one month's notice- and in accordance with that, action was taken, the action cannot be sustained. It has been ruled by the Supreme Court that such a contract or termination of service is opposed to public policy, and State or State Undertakings cannot hire and fire under the garb of such a term, rule or contract. (See Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, ; West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, This Court while following the decisions in Brojo Nath Ganguly's case and Desh Bandhu Ghosh's case, in case of Jiwanlal Pathak 1987 MPLJ 376 : 1987 JLJ 773 held that it is now settled that the protection of Article 311 can be invoked not only by permanent public servants, but also by public servants who are employed as temporary servants or probationers. True, as contended by Shri P. D. Agrawal, Panel Lawyer for the State, Ext. D-8 is an innocuous order and the Court cannot go behind the order, but before issuance of this order, Ext.D-7 dated 12th May 1982 was issued, which gave reason for dispensing with the service, that the appellant was in the habit of remaining habitually absent from duty and was not discharging his duties with devotion. The Court in the circumstances is bound to lift the veil. Ext. E-7 clearly demonstrates that the services were terminated for misconduct. The appellant being a work-charged employee, while imposing a penalty Under Rule 13 of the Rules for any misconduct enumerated in Rule 12, the procedure prescribed Under Rule 14 of the Rules ought to have been followed. That having not been done, the termination order, which casts a stigma of disqualification for future employment, cannot be sustained. Besides Rules 12 and 14, the principles of natural justice ought to have been followed, and no order for dispensing with service can be passed even on the ground of absence without leave and without reasonable cause, as said by the Supreme Court in case of Mafatlal Naraindas Barot Vs. Divisional Controller, State Transport Corporation and Another,

There is another aspect of the matter, that Ext.D-7 states that the appellant's

services were terminated for remaining absent from 7-1-1981, but when Ext.D-5 dated 24-2-1981 was served refusal of leave was not communicated to the appellant and after termination he was allowed to join duties from 16-3-1981. though the employer knew fully well that remaining absent from duty without leave amounted to misconduct. Such a conduct of the employer shows that the employer condoned the misconduct committed by the employee/appellant. A Division Bench of this Court in case of Omprakash Joshi 1989 MPLJ 575 , placing reliance on an earlier Division Bench decision of this Court in Lal Audhraj Singh Vs. State of Madhya Pradesh, and a Single Bench decision in case of Vithal Vinayak Bapat AIR 1941 Nag. 125. has held that a master cannot impose any punishment on a servant for a misconduct which was known to the master and which he has condoned, and the employer will be estopped to take action subsequently on the same misconduct which has been condoned.

As a result of the above discussion, the order of termination cannot be sustained.

The grievance of the appellant that when he was acquitted of the charges, the respondent was bound to reinstate him with continuity of service from 29-9-1976 and ought to have paid the arrears of salary with increments, has also got a force. True, the appellant joined his services from 1-11-1980. but he protested in so many words and demanded the arrears and continuity of service, but no heed was paid. The appellant in paras 5, 6, 7 and 8 of the plaint made clear averments and challenged the action. True, in the relief clause, the relief was not specifically claimed but that would not disentitle the appellant/plaintiff to the relief to which he is entitled on facts and in law. Besides claiming the declaration of termination order being illegal and void, in clause (c) the plaintiff claimed other reliefs which the Court, in the circumstances of the case may deem to grant him. It is settled that the Court certainly possesses power to grant a relief which the plaintiff could have prayed for in the alternative, provided no party is taken by surprise and there is sufficient material to pass the decree. (See Kidar Lall Seal and Another Vs. Hari Lall Seal, Firm Shrinivas Ram. AIR 1951 SC 177 and Baboolal 1960 JLN 139).

The facts clearly show that the appellant did not remain mum, he protested and demanded continuity in service and arrears of salary with increments by repeated letters, and then made clear averments in the plaint. Evidence was also led to that effect. Therefore, there was no surprise to the respondent and the Court in such circumstances is well within its jurisdiction to grant relief, and a party should not be punished for clumsy or inartistic drafting of the plaint; it is always open to a Court to give the plaintiff such general or other relief as it deems just to the same extent as if it had been asked for, provided that occasions no prejudice to the other side. I need not delve on the question whether, as soon as the appellant was arrested, there was any power in the employer to terminate the services or not. Suffice it to say, that at that stage also the respondent acted in contravention of Rule 8(1)(b) of the Classification, Control and Appeal Rules, which makes a provision for suspending an employee

in respect of any criminal offence under investigation or trial. Even after the conviction by the Sessions Court, the respondent was bound to hold an inquiry as said by a Division Bench of this Court in *Tikaram Windwar* 1978 MPLJ 57 : 1978 JLJ 201 , placing reliance on *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, that a conviction on a criminal charge does not necessarily mean, that the employee concerned should be removed or dismissed from service. The nature of penalty will naturally depend upon the gravity of the offence for which the employee is convicted. It is, therefore, necessary for the disciplinary authority to decide even in such cases whether in the facts and circumstances of a particular case, what penalty, if at all, should be imposed on the delinquent employee, and for that the delinquent should be noticed to put forward his point of view and the circumstances of the case why no penalty or a lesser penalty should be imposed on him. But, that circumstance now is not present in this case, as the order of conviction was set aside and the appellant was acquitted, and when he was acquitted of the charges, subsequent departmental proceeding against him in respect of the same charges was barred, (see Division Bench decision of this Court in *R. J. Divekar* 1984 MPLJ 73). The acquittal was not on technical grounds and there is no charge against the appellant that because of his conduct, for which he was prosecuted and tried, he is unworthy of being retained in service. Therefore, the action of the respondent in giving a fresh appointment and denying the continuity in service, arrears and ancillary benefits, was clearly illegal.

As a consequence, the action of the respondent of giving fresh appointment on 1-11-1980 without giving continuity in service and ancillary benefits as well as the order dated 22-7-1982 (Ext.D-8) deserves to be and is hereby set aside. The normal rule is that whenever a dismissal order is set aside or quashed an employee is entitled to full back wages and other ancillary reliefs but the rule has to be departed from, in the present facts and circumstances of the case. It is evident from the material on record that the appellant was illegally terminated from service in 1976, but then he did not challenge the action of the concerned authority by taking recourse to quicker remedy. Thereafter, when the appellant was given a fresh appointment, he again did not take recourse to constitutional remedy by filing a writ petition, or even a civil suit; but when the appellant's services were again terminated on 22-7-1982 he challenged both the actions by instituting the suit after giving a notice u/s 80, Civil Procedure Code. Therefore, it would be inequitable to grant the relief of back wages to the appellant for the period prior to the date of institution of the suit, i.e., 13-4-1983. Grant of back wages would only be proper from the date when the dispute was raised by instituting the suit. The plaintiff will be deemed to continue in employment right from 29-9-1976 and will be entitled to ancillary benefits, except that of back wages prior to 13-4-1983, which has been denied by this Court on inequitable grounds, and for that I place reliance on a recent decision of this Court in *Badriprasad v. State of M. P. through District Education Officer, Shivpuri and Ors.*, S. A. No. 146 1987, decided on 24-10-1990.

In result, the appeal is allowed; the judgment and decree of the lower appellate Court is set aside, and the suit of the plaintiff/appellant is decreed as indicated hereinabove. A decree be prepared accordingly.

In the circumstances, parties will bear their own costs of this appeal.