

(1980) 11 RAJ CK 0001
In the Rajasthan High Court
Case No : Civil Second Appeal No. 479/68

Mahendra Singh

APPELLANT

Vs

Secretary Local Self Government

RESPONDENT

Date of Decision : 06-11-1980

Acts Referred:

Constitution of India, 1950 — Article 311

Citation : (1980) WLN 457

Hon'ble Judges : S.N. Deedwania, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.N. Deedwania, J.—This Civil Second appeal is preferred by Mahendrasingh plaintiff-appellant against the judgment, dated July 12, 1968 of the learned District Judge, Pratabgarh, whereby, the appeal was dismissed.

2. Briefly stated the relevant facts for disposal of this appeal are these. The plaintiff-appellant was appointed as an Overseer by resolution of the Municipal Board, Pratabgarh on 15.10.56 and worked in this capacity from 5.11.56 to 28.8.56. He was convicted for the offence of taking bribe during this period. The Municipal Board, Pratabgarh again appointed him on the same post on 28.8.63 and this was a fresh appointment. Thereafter, his services were illegally terminated by the order, dated August 13, 1965 of the Municipal Board, Pratabgarh. His services were terminated in accordance with the directions of the Local Self Government, Rajasthan, Jaipur No. F. 18(a) (131) DL-B/65/23474 dated July 21, 1965 w.e.f. 31.8.65. The plaintiff-appellant prayed for the following reliefs:

(1) The plaintiff is entitled to Rs. 1638/- by way of arrears of salary and is entitled 10 future salary.

(2) The order of termination of the service of the plaintiff is void being in contravention of the Rajasthan Civil Services (Classification Control and Appeal)

Rules, 1958.

The defendant contested the suit, it is averred in the written statement that the Municipal Board could not employ a man convicted of an offence involving moral turpitude. Moreover, at the time of re-appointment, the plaintiff was over-age and sanction of the Director of Local Self Bodies, for such an appointment was necessary. The plaintiff was a temporary servant and, therefore, his services could be terminated without notice. The trial court held that the plaintiff was duly re-appointed. It further held that in fact, the plaintiff came to be appointed as an overseer on 15.10.56 and order dated 28.8.63 (Ex. 6) of the fresh appointment of the plaintiff was the order to reinstate him. However, the plaintiff was a temporary servant because though he was substantively appointed but was not permanent, as the word "substantive" has been used in contradiction to word "officiating". According to learned Civil Judge, this was evident from proviso to rule 7 of the Rajasthan Municipal (Subordinate & Ministerial Service) Rules, 1963 (hereinafter referred to as the Rules). The Civil Judge Pratabgarh further held that the order of termination of the service of the plaintiff was not illegal because he was a temporary servant. He was only entitled to month's pay in lieu of notice. The learned District Judge, substantially agreed with the findings of learned Civil Judge but was further of the opinion that the plaintiff was given a fresh appointment w.e.f. 28.8.63. The plaintiff was temporary employee of the Municipal Board because of the absence of any evidence that the services of the plaintiff were integrated under the Rules. The rules did not apply to him because his appointment, was made w.e.f. 28.8.63 and the Rules came into force on 24.11.63. At this stage, I may also say that the plaintiff, in para 1 of the plaint stated that he was initially appointed on 3.11.56 and worked on this post till 28.8.63. The plaintiff was convicted under the Prevention of Corruption Act. However, the Municipal Board gave him a fresh appointment on 28.8.63. These facts were not contested in the written statement. However, during the trial, order Ex. 7 dated April 8, 1965 was also produced by the plaintiff, in which it was specially stated that the plaintiff was reinstated w.e.f. 28.8.63.

3. I have heard the learned Counsel for the parties and gone through the entire record of the case carefully.

4. The points for determination this second appeal are:

- (1) Whether the plaintiff was a permanent employee of the Board?
- (2) Whether his termination order dated August 18, 1965 (Ex. 9) is illegal?

5. Learned Counsel for the appellant vehemently argued that the trial court had given finding in favour of the plaintiff that the order, dated August 28, 1963 (Ex. 6) purporting to give fresh appointment must be construed as an order of reinstatement. The learned appellate court was in error in coming to a conclusion that it was not so, merely on the basis of some conjectures without any evidence to that effect.

6. On the other hand, it is argued by learned Counsel for the respondents that it was not the case of the plaintiff that he was a permanent employee of the Board w.e.f. 5.11.56. It was not so pleaded and, therefore, learned Civil Judge was in error in arriving at this finding under issue No. 4, which was as under:

Issue No. 4:--Whether the appointment of the plaintiff on 28.8.63 was temporary one and the plaintiff's services could be terminated without notice."

However, it is further contended by learned Counsel for the appellant that the parties were aware of the real dispute between them. Therefore, it could not be said that any of the parties was prejudiced. The parties went to trial on his aspect of the case whether the plaintiff was appointed w.e.f. 5-11-56 and order (Ex. 6) was nothing but an order of reinstatement. I have considered the rival contentions. There is no doubt that the plaintiff has not pleaded that he was substantive appointee of the Board w.e.f. 1-11-56. However, it is clear that both the parties were aware of this position and they went to trial keeping this dispute in view. I am, therefore, of the opinion that it could not be said that the defendants were prejudiced in their defence. The trial court committed no error in considering the case of the plaintiff that order Ex. 6 is nothing but an order of reinstatement. In this connection, I may refer to *Saraswati Debi and Others Vs. Satya Narayan Gupta*, After noticing all the relevant case law, it was thus observed.

(i) The parties must have fully known before going to the trial that the new plea taken would be thrashed out and decided in the suit to have a bearing on the ultimate result of the suit. None of the parties should be taken by surprise on account of a new plea foreign to the pleading of the party raising it.

(ii) The opponent of the party setting up the new plea must have accepted the challenge of the said plea without objection as to its absence in the pleading or issue by adducing rebutting evidence or otherwise dealing with the same.

(iii) The party challenging the plea must have reasonable opportunity to meet it effectively and to adduce evidence against the said plea.

(iv) The Court must see that by allowing one party to raise a new plea, or case not pleaded in his pleading, or for which no issue was framed, no prejudice or injustice is done to the other party.

(v) The new plea set up should not be otherwise legally barred. If the conditions mentioned above are fulfilled, then the Court can legitimately act upon the new plea not finding any place in the pleading and on which no issue has been framed when the said pleas are proved. The absence of issue in a case like this will be of no avail and the objection, if any, becomes technical having no value.

The learned District Judge, while disagreeing with the finding of the Civil Judge, thus observed:

The contention of Shri Surendra Kumar appears to have force. The Rajasthan

Civil Services (Classification, Control and Appeals) Rules, 1958 were made applicable to the employees of the Municipal Boards by rule 36 of the Rajasthan Municipal Subordinate and Municipal Service Rules 1963 which came into force with effect from 24-11-63. It is not plaintiff's case that any other rules or orders were in force before 24-11-63 governing the appointment, suspension and dismissal and removal and other conditions of the staff of the Municipal Board Pratapgarh. Had, the Municipal Board suspended the plaintiff by any resolution or order, the plaintiff could not have failed to produce it or get it produced from the defendant. The whole case of the plaintiff in the plaint was that he was given fresh appointment on 28-8-63 and so his previous conviction before that date effect is new appointment & his services can not be terminated on account of his conviction previous to 28-8-63. There is no reference of his suspension or reinstatement throughout the plaint. The plaintiff's appointment was therefore a fresh appointment by the Municipal Board by its resolution (Ex. 6) dt. 26-8-63 and not his reinstatement, so as to give him continuity of service.

I am afraid that learned District Judge did not appreciate the core of the problem correctly. It was not disputed even in the written statement that the plaintiff was the employee of the Board from 5-11-55 to 28-8-63. It was never pleaded in the written statement that the services of the plaintiff were ever terminated during this period. In the absence of any evidence on the record of the case, learned District Judge could not have arrived at a finding that Ex. 6 was nothing but an order of fresh appointment, especially in view of Ex. 7 which clearly stated that the plaintiff was reappointed. I may further state that it is of little relevance whether plaintiff was given a fresh appointment or he was reinstated by order Ex. 6 because the crucial question is whether the plaintiff was a permanent employee. At this stage. I may observe that learned Civil Judge held that the appointment of the plaintiff vide Ex. 6 was illegal but learned District Judge was of the view that this fresh appointment was legal.

7. Learned Counsel for the respondents tried to argue that for various reasons this appointment vide Ex. was illegal. I am not impressed because there is no evidence to show that the appointment was illegal. Learned District Judge rightly held that this appointment was not illegal. It is also extremely doubtful whether the respondents could challenge the legality of their own order Ex. 6. It is observed in *State of Assam and Anr. v. Raghava Rajgopalchari* 1972 SLR 44.

8. Before proceeding further; it may be recalled that the rules came into force on 24-11-1963, Rule 7 of the Rules and Rule 36 of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 are to the following effect:

Rule 7. Initial constitution of the service and classification of Board:

(1) All the persons holding appointments to the different categories of posts included in service on 17-10-1959 shall be deemed to have been substantively appointed therein by the Board under the provisions of these rules.

(1) All persons appointed during the period 17-10-1959 to 23-11-1963 and who

have been confirmed during the said period shall be deemed to have been substantively appointed on these posts in the service from the date of such confirmation; and those who have not been so confirmed shall be treated as probationers and may be confirmed in accordance with the provisions of the rules:

Rule 36. Removal of doubts:

Where a doubt arises as to who is the head of any office or as to whether any authority is subordinate to or higher than any other authority or as to the interpretation of any of the provisions of these rules or their applicability the matter shall be referred to the Government in the Appointment Department whose decision thereon shall be final.

9. It is strenuously argued by learned Counsel for the respondents that the Rules came into force on 24-11-1963 and the plaintiff was re-appointed on 28-8-63 (Ex. 6) and, therefore, these rules were not applicable to him. He did not become a member of service and his appointment was purely temporary. I have considered the arguments carefully, but in my opinion, they are devoid of any force. I have already observed that order Ex. 6 was nothing but an order of reinstatement and, as the plaintiff was holding the post of Overseer on 17-10-59 and was in service when the Rules came into force, he was deemed to have been substantively appointed thereto by the Board under Rule 7(1) of the Rules. The argument of learned Counsel for the respondents that the rules were not applicable to him, therefore, does not hold water. Even if, Ex. 6 is taken to be an order of a fresh appointment then it is not possible to hold that the appellant was a temporary employee. The appellant was again appointed on 28-8-63 vide order Ex. 6. I have perused the order, dated August 28, 1963 (Ex. 6) carefully and it does not mention that the appellant was appointed on temporary basis. Therefore, order Ex. 6 could only be construed to mean that the appellant-plaintiff was appointed on substantive basis. Under rule 7(2) of the Rules, all persons appointed during the period 17-10-1959 to 23-11-1963 and confirmed during the said period are also substantive appointees.

10. It is sought to be argued by the learned Counsel for the respondents that the appellant was appointed on 28-8-1963 but was not confirmed upto 23-11-1963, therefore, his appointment was purely temporary. I am not inclined to agree with the submission. Presuming that the appellant-plaintiff was appointed on 28-8-1963 on temporary basis, his appointment still even for want of confirmation, did not remain temporary as such an appointment is deemed to be on probation and the appellant became a probationer.

11. However, as already stated from order, dated August 28, 1963 (Ex. 6), it is not possible to hold that the appellant plaintiff was appointed on a temporary basis. It appears that Ex 6 gave a substantive appointment otherwise word "temporary" would have been used in Ex. 6. If one was appointed on a permanent basis without any term of probation during 17-10-59 to 23-11-63, in

my opinion, such an appointment also implied confirmation on the date of appointment and, therefore, he became a permanent employee under rule 7(2) of the Rules. The import of Rule (sic)(2) of the Rules could not be to convert a permanent appointment into any other kind of appointment. In this view, it appears that even under rule 7(2) of the Rules, the appellant became a member of service.

12. In any case, appellant-plaintiff did not remain a temporary servant. Even if, order Ex. 6 is taken to be an order of temporary appointment, the appellant became a probationer because the rule further says that those who have not been so confirmed, shall be treated as probationers. The appellant was, therefore, a probationer. The connotation or the meaning of the term "probationer" is now well understood, it does not mean a temporary appointment, It is a substantive appointment with the limitation that the service of a probationer is liable to be terminated, if it appears at any time or at the end of the period of probation that he has not made sufficient use of the opportunities or has failed to give satisfaction to the appointing authority. Therefore, I am of the opinion that it could not be said that the appellant plaintiff was a temporary employee. Both the courts below fell in error in arriving at such a conclusion. It is not the case of the respondents that the services of the appellant-plaintiff were terminated in accordance with the Rules. Their case, which found favour with the courts below was that the appellant-plaintiff was a temporary employee and, therefore, his services could be dispensed with by giving one month's notice. It is an admitted position that the service of the appellant was not terminated under rule 16 of the Rajasthan Civil Service (Classification, Control & Appeal) Rules, 1958. Learned Counsel for the respondents again urged that rule 36 of the Rajasthan Civil Service (Classification, Control & Appeal) Rules, 1958 was not applicable to the appellant but this contention has no force because the rules were applicable to the appellant as he was a permanent employee of the Board. The Rules would apply even if the appellant was a probationer. The service of the appellant could have been terminated under rule 16 of the Rajasthan Civil Service (Classification, Control & Appeal) Rules, 1958. However, it is also equally well settled that an employee can not be dismissed or removed from his service even under this rule without giving him show cause notice. It was not the case of the respondents that the services of the appellant were terminated under rule 16 of the Rajasthan Civil Service (Classification, Control & Appeal) Rules, 1958 and in any case such termination is void because admittedly, no show cause notice was given to the appellant. It was thus observed in the following authorities:

(1) The The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others,

The Rajasthan High Court in Civil Writ Petition No. 352 of 1971 concerning Civil Appeal No. 352 of 1975 has given a very wide connotation to the word "consider" as appearing in Rule 14 and has held that the word "consider" is wide

enough to require the disciplinary authority to hold a detailed determination of the matter. We feel that we are not in a position to go to the extreme limit to which the Rajasthan High Court has gone. The word "consider" has been used in contradistinction to the word "determine". The rule-making authority deliberately used the word "consider" and not "determine" because the word "determine" has a much wider scope. The word "consider" merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge. This matter can be objectively determined only if the delinquent employee is heard and is given a chance to satisfy the authority regarding the final orders that may be passed by the said authority. In other words, the term "consider" postulates consideration of all the aspects, the pros and cons of the matter after hearing the aggrieved person. Such an inquiry would be a summary inquiry to be held by the disciplinary authority after hearing the delinquent employee. It is not at all necessary for the disciplinary authority to order a fresh departmental inquiry which is dispensed with under Rule 14 of the Rules of 1968 which incorporates the principle contained in Art. 311(2) proviso (a). This provision confers power on the disciplinary authority to decide whether in the facts and "circumstances of the particular case what penalty, if at all should be imposed on the delinquent employee it is obvious that in considering this matter the disciplinary authority will have to take into account the entire conduct of the delinquent employee, the gravity of the misconduct committed by him, the impact which his misconduct is likely to have on the administration and other extenuating circumstances or redeeming features-if any present in the case and so on and so forth. It may be that the conviction of an accused may be for a trivial offence as in the case of respondent T.R. Challappan in Civil Appeal No. 1664 of 1974 where a stern warning or a fine would have been sufficient to meet the exigencies of service. It is possible that the delinquent employee may be found guilty of some technical offence, for instance, violation of the transport rules or the rules under the Motor Vehicles Act and so on, where no major penalty may be attracted. It is difficult to lay down any hard & fast rule as to the factors which the disciplinary authority would have to consider but I have mentioned some of these factors by way of instances which are merely illustrative and not exhaustive. In other words, the position is that the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary inquiry as to the nature and extent, of the penalty to be imposed on the delinquent employee and in the course of their inquiry if the authority is of the opinion that the offence is too trivial of a technical nature, it may refuse to impose any penalty in spite of the conviction. This is a very salutary provision, which has been enshrined in these rules and one of the purposes for conferring his power is that in cases where disciplinary authority is satisfied that the delinquent employee is- a youthful offender who is not convicted of any serious offence and shows poignant penitence or real repentance he may be dealt with as lightly as possible, this

appears to us to be the scope and ambit of this "provision. We must however, hasten to add that we should not be understood as laying down that last part of rule 14 of the Rules of 19, 6, 8 contains a licence to employees convicted of serious offences to insist on reinstatement. The statutory provision referred to above merely imports a rule of natural justice: in enjoining that before taking final action in the matter the delinquent, employed should be heard and the circumstances of , the case may be objectively considered. This is in keeping with the sense of justice and fair-play.

(2) Kuldeep Singh v. Union of India 1974 RLW 171.

But the crucial words, which fall for our interpretation, are "the disciplinary authority may consider the circumstances of the case and pass such orders thereon as it deems fit." The word "consider" or the process of consideration has within its ambit an examination of circumstances with objectivity rather than a mere subjective conclusion. Essentially it implies the duty to act judicially. The order of dismissal, removal or reduction in rank as a result of conviction by a criminal court cannot be called a consequential order. The other side of the picture is not available to the authority called upon to objectively consider and judicially decide an important right of a Government servant whether he is to be retained in the Government service or whether his status is going to be affected.

The Government servant although he is denied the benefit of an enquiry and a notice of the proposed penalty he can never the less be given an opportunity of showing his side of the case if he is told that an action was proposed to be taken against him under Rule 1719. Any objective consideration necessarily implies the; examination of the two sides of the matter and the duty conferred on the punishing authority under Rule 1719 postulates that he must have both sides of the picture before he can adequately discharge the onerous duty or reaching the conclusion which to the Government servant concerned is a matter of vital importance. In our opinion, therefore on the authority of the Supreme Court and on a correct interpretation of the words consider the circumstances, of the case Rule 1719 requires that an intimation must be given to the Government servant if an action is to be taken under Rule 1719. It is on principles of natural justice that such a step is warranted.

13. I am therefore of the view that the order dated 18-8-65 (Ex 9) of the Board dispensing with the services of the appellant w.e.f. 31-8-85, which was passed in accordance with the Local Self Government, Rajasthan, Jaipur Order No. F.18(a) (131) DLB/65/234 73 dt. 21-7-65 is illegal and void. In the result, the appeal is accepted and suit of the plaintiff is decreed with costs through out as under:

1. It is hereby declared that the order dated 21-7-1965 of the Municipal Board Pratapgarh dispensing with the services of the appellant, which was issued in accordance with order No, F. 18(a)(131) DLB/65/23474 dt. 21-7-65 is illegal and void.

2. The appellant shall get Rs. 1638/- as arrears of salary.

3. He shall also get his arrears of salary with all consequential benefits w.e.f. 18-4-66 to the date he reinstated.