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(2013) 10 GUJ CK 0046

In the Gujarat High Court

Case No : Second Appeal No. 49 of 2010

Mansukhlal Govindbhai Tank — APPELLANT

Vs

State of Gujarat and Another — RESPONDENT

Date of Decision : 07-10-2013

Acts Referred:

Citation : (2014) LabIC 510

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Anand B. Gogia, B.B. Gogia and R.B. Gogia, for the Appellant;

Judgement

N.V. Anjaria, J.—It was on the following substantial questions of law that the present Appeal came to be admitted by this court.

A. Whether the punishment order of removal from service was justified and legal in the circumstances and facts of the present case, when the absence of appellant only for 32 days was not intentional and was under compulsion of circumstances and was beyond control of the delinquent?

B. Whether the punishment order of removal was justified and sustainable when on request of the appellant (original plaintiff), the Competent Authority on consideration facts and circumstances of the case, granted the leave of said period subsequently as leave without pay, within 20 days of resumption.?

C. Whether the punishment order of removal from service is not too harsh, severe, disproportionate and thus hit by Article 16 of the Constitution of India as an arbitrary in the circumstances and facts of the case.?

The appeal is directed against judgment and decree dated 25th September, 2009 passed by the presiding offer Fast Track Court No. 7, Rajkot in Regular Civil Appeal No. 03 of 2004. Thereby, the appeal was allowed by the first appellate Court setting aside the judgment and decree of the Trial Court. The Trial Court had decreed the suit of the appellant-plaintiff on 17th October, 2002 declaring

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order dated 25th April, 1990 dismissing the plaintiff from service as illegal further declaring that he was continued in service with back wages and other benefits.

2. The facts in the background leading to this appeal and with reference to which the aforesaid questions of law arise for consideration may be stated at the out set. The appellant was an armed police constable serving since 1983 in the State Reserve Police Force. A show-cause notice/imputation of charge dated 02nd December, 1989 came to be issued to him by the competent authority-Senapati. The charge levelled was that he had gone on leave for three days from 31st July, 1989, however, remained absent for 31 days without intimation and without any request for extension of leave. It was stated that thereby he committed misconduct and his conduct was unbecoming of a police constable.

2.1 Departmental proceedings were initiated against him under Gujarat State (Discipline and Appeal) Rules, 1971, and Inquiry Officer was appointed. It further appears that a show-cause notice dated 09th April, 1990 came to be issued to the appellant delinquent stating inter alia that the Inquiry Officer had started the inquiry proceedings, in which on 04th January, 1990 primary statement of the appellant was recorded. It was stated in the show-cause notice further that in the said reply dated 04th January, 1990, there was an admission on the part of the delinquent that he did not want to engage anyone to represent him in the inquiry and that inquiry was valid. On such basis in the said notice, the delinquent was called upon as to why he should not be dismissed from service under the rules. Thereafter, order dated 25th April, 1990 (Exh. 41) was passed dismissing the appellant from service.

2.2 Appellant thereafter instituted Civil Suit No. 762 of 1990 before the Court of Civil Judge (S.D.) Rajkot for declaration and permanent injunction, praying that order of dismissal dated 25th April, 1990 be declared to be illegal and the plaintiff be reinstated in the service with payment of arrears of salary and other consequential service benefit. In the plaint, it was the case of the plaintiff that the charges levelled in the charge-sheet were false. It was averred that the plaintiff remained absent for valid reasons. Further, defendant No. 2-Senapati was making illegal and illicit demands and since the plaintiff did not pay heed to it, he was falsely implicated and was subjected to departmental inquiry. He submitted in the plaint that he was not permitted to Singh in the muster roll by defendant No. 2; that his absence in question was because of the fact that his 28 days son was to be operated upon for serious stomach ailment in the Government Irwin hospital, Jamnagar.

2.3 It was the plaintiff''s case that he had sent the leave report, but defendant No. 2 did not take the same on record and created a situation to show that the plaintiff was on leave without permission and thereafter charge-sheet was issued. It was thereafter averred that he was not being intimated in respect of the dates in the departmental inquiry and even if he happened to be present before Inquiry Officer on particular dates, his presence was not noted. Notice

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dated 09th April, 1990 was given thereafter to show-cause as to why he should not be dismissed. On such pleadings and raising various grounds and alleging breach of service rules applicable to him, the suit prayers were made.

2.4 The suit was contested by the defendant-state by filing written statement at Exh. 19 contending therein inter alia that even if the case for absence was on account of plaintiff''s son, he could have sent a report. It was contended that the plaintiff had submitted medical certificate only subsequently on 04th September, 1989. It was contended that the plaintiff had initially admitted the charge and accepted the departmental inquiry, therefore, punishment of dismissal was justified and the same was in the interest of discipline in the department.

2.5 The Trial Court framed issues at Exh. 84 and ultimately decreed the plaintiff''s suit setting aside the order of dismissal, and further directing the defendants to pay Rs. 6,224/- with 7% interest being the salary payable from the date of dismissal till the institution of the suit. The Trial Court on the basis of evidence before it concluded that for remaining absent, the plaintiff had a justifiable reason and further that the period of his absence written statement later on sanctioned as leave without pay. The first appellate Court, however, allowed the appeal setting aside the judgment and decree of the trial Court.

3. Heard learned advocate Mr. A.B. Gogia for the applicant and learned AGP Mr. Rahul Dave for the respondents-State Authority.

3.1 Learned advocate for the appellant supported the judgment and decree of the trial Court. He submitted that the plaintiff had not only valid reason to remain absent as his son was to be operated, but also the period in question was subsequently dealt with by the authority, that was treated to be leave without pay. He submitted, therefore, that there was no basis for levelling any charge of misconduct, or for issuance of show-cause notice. Learned advocate for the appellant in support and in substantiation of his submissions relied on various decisions referred to in the succeeding paragraphs.

3.2 On the other hand learned AGP submitted that the matter was related to service dispute and, therefore, the Civil Court has no jurisdiction. He submitted that Civil Court jurisdiction was not attracted more particularly when there was no allegation of breach of natural justice; nor the case was one of no evidence. In his submission, Civil Court''s jurisdiction would be attracted only on the said two considerations. He further submitted that in the impugned order of penalty, it was specifically mentioned that departmental remedy, was available with the plaintiff. Though available that remedy was not exhausted by the plaintiff. Therefore also the Civil Court had no jurisdiction according to his submission. Learned AGP next submitted that the plaintiff being a police constable remained absent for long 31 days without submitting any report. He submitted that the punishment was imposed properly and was based on the admission of plaintiff. Learned AGP relied on the following decisions in support of his submissions above, (i) State Bank of Bikaner and Jaipur Vs. Nemi Chand Nalwaya, (ii) State

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of Gujarat and Another Vs. Jamal Mahammed Ismail Bloch, (iii) The State of Punjab and Others Vs. Bakshish Singh, (iv) Gujarat State Road Transport Corporation Vs. Keshavlal Anandji Vaghela,

4. At the outset, it may be noted that the show-cause notice relating to the penalty as well as the order of penalty mentioned about the delinquent''s reply dated 04th January, 1990. It was stated in the reply that he admitted his guilt. Conspicuously, the said reply was never produced on record. It is not possible to know what was the nature and language of the alleged admission, if at all it was there, on the part of the delinquent. In any view, what was observed in the show-cause notice/order with reference to the said reply dated 04th January, 1990 that the plaintiff-delinquent stated that he was given complete opportunity of defending himself in the inquiry proceedings and that he did not want to engage his representative in the inquiry and the inquiry was acceptable to him. Such a statement did not tantamount to admission of the guilt. Acceptance of validity of inquiry did not account to admission of the guilt or acceptance of charges. The authorities considered it to be an admission treating the charges against the delinquent proved on that basis which was totally not justified.

4.1 The contention about Civil Court having not jurisdiction raised by learned Assistant Government Pleader may be considered at this very stage. It is well settled that unless specifically barred, Civil Court has jurisdiction u/s 9 of the Code of Civil Procedure, 1908 to try all the disputes of civil nature. It is also trite principle that presumption is about Civil Court having jurisdiction rather than its exclusion. Merely because it was a service matter, the contention of learned Assistant Government Pleader that Civil Court would not have jurisdiction, was not tenable and could not be countenanced.

4.2 The suit of the plaintiff was against ''state'' Authorities. It was for declaration that order of penalty was illegal. On perusal of the plaint it was seen that plaintiff had pleaded breach of natural justice. It was also pleaded that he was not given necessary documents and he was not permitted to cross-examine witnesses which had caused him prejudice and it amounted to violation of natural justice. It was contended that the whole departmental inquiry was a show-off and he was victimised. It was the case that departmental inquiry was in breach of the relevant disciplinary conduct Rules. Therefore, having regard to the averments and the contention in the suit, which was against State Authorities, Civil Court''s jurisdiction would be attracted.

4.3 The following observation from decision of the Apex Court in Rajasthan State Road Transport Corporation and Another Vs. Bal Mukund Bairwa, answers the contention:

The appellant Corporation is bound to comply with the mandatory provisions of the statute or the regulations framed under it. A subordinate legislation when validly framed becomes a part of the Act. It is also bound to follow the principles of natural justice. In the event it is found that the action on the part of the State

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is violative of the constitutional provisions or the mandatory requirements of a statute or statutory rules, the civil court would have the jurisdiction to direct reinstatement with full backwages. (Para 39)

5. Turning now to the facts of the case, certain facts emerged undisputed. The absence from duty by of the plaintiff was because of the fact that his 28 days old infant son had to undergo a major surgery of his stomach. The plaintiff was already on leave for three days on the ground of ailment of his said son and surgery was fixed. Therefore, the plaintiff had to stay over beyond the leave period of three days which was from 01st August, 1989 to 03rd August, 1989. He could not resume duty at the end of three days, and could join back only on 04th September, 1989 after absence of 31 days. The case of illness of his infant son was established on the basis of medical papers on record in that regard. Those documents included the Doctor Certificate (Exh. 45), the card of Irwin Hospital Jamnagar (Exh. 46), X-Ray report (Exh. 47), report of the Pathological test (Exh. 48) and other documents evidencing the ailment. The plaintiff examined himself at Exh. 44 in which he inter alia explained the circumstances due to which he had to proceed on leave because of his son''s ailment and that he was informed by his younger brother about his son''s ailment requiring him to proceed on leave. He stated that before one year back, his first son had died due to miscarriage.

5.1 By letter dated 07th September, 1989 (Exh. 39), the plaintiff requested the higher authorities to sanction complementary leave on the above ground of his son''s ailment. The application made by him was accompanied by medical certificate dated 31st August, 1989 (Exh. 41) that his son was required to be operated upon and that he needed post operation treatment. Significantly, the 31 days absence was considered by the competent authority and it accepted the leave application of the plaintiff subsequently made as above. His absence was treated as leave without pay. In The State of Punjab and Others Vs. Bakshish Singh, it was held that when the authorities themselves had regularized and treated the respondent''s absence from duty as the period of leave without pay, it could not be legally said that he was guilty of misconduct for unauthorized absence from duty.

5.2 In Bhursinh Hamsinh Rajput v. State of Gujarat (1982(1) All India Service Law Journal 697), this High Court dealt with a similar case which was also of an armed police constable. Who remained away from duty without previous sanction, and was charge-sheeted for such misconduct. The authority had proceeded to hold him guilty and punish him on the basis of his so called admission of guilt at the initial stage. The Court disapproved the approach of the authority and held that even in reply to second show-cause notice, the delinquent was entitled to show that he was not guilty and the punishing authority was required to extend him the opportunity. In that case too, the leave period with reference to which the charge of unauthorized absence was levelled, was found sanctioned without pay. It was held by the Court that the plea of

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disciplinary authority to lay action against him for negligence in duty was not tenable. The Court observed,

The petitioner''s next contention deserves to be closely examined. The petitioner''s leave was sanctioned for the period from 18.12.1975 to 04.01.1976 as the leave without pay. The D.S.P. admits this fact and still allegation against him is that he had absented without leave being sanctioned. The reason put forward is that it was an administrative order, whereas the action sought to be taken against him was on the ground of negligence of duties. Once the leave is sanctioned of whatever character it might be the sting from that absence is taken away. So the finding of the D.S.P. on this score proceeds against the admitted facts and on this ground, the order cannot be allowed to stand. (Para 3)

5.3 Again in an Allahabad High Court decision in Shamsher Bahadur Singh v. State of Uttar Pradesh (1993(2) SLR 736 (Allh.)), a police constable had remained absent for 57 days without prior permission but record showed that the said period was condoned by sanctioning leave for that period. It was held that the charge of absence lost its significance and penalty of removal was not justified. In Babulal v. Union of India (2000 LIC 1975 (Raj.)) the Rajasthan High Court held in similar way in respect of an railway employee who was charged with unauthorized absence. He took treatment of private doctor against Railway Rules. The period of absence was treated as leave without pay and was accordingly regularised, and there was no railway available where he was posted. The Rajasthan High Court set a side the compulsory retirement of that petitioner holding that finding of unauthorised absence and about contravention of rules was perverse.

5.4 Furthermore, the plaintiff in the present case, though subsequently, did submit the leave report for the extended period accompanied by necessary medical certificate evidencing the cause. The genuineness of the cause or the certificated was never in question, nor was doubted. Thus the facts showed that the plaintiff had a bona fide cause. The cause was beyond his control. It cannot be gainsaid that his remaining absent was for a good and acceptable reason. If for such reason, the plaintiff as a father remained absent and could not send the report immediately, it was pardonable. It could not be said that his absence was deliberate or willful.

5.5 The circumstance which required the plaintiff to overstay the leave and prevented him from rejoining the duty was the operation of his infant son. It was compelling for him to stay over. His first male child had died in a miscarriage. When the absence for 31 days was for the above compelling reason, it cannot be termed as wilful and cannot amount to misconduct. In Krushnakant B. Parmar Vs. Union of India (UOI) and Another, the appellant before the Supreme Court was working as Security Assistant, and was proceeded departmentally for the charge of remaining unauthorisedly absent. The disciplinary authority alleged that he failed to maintain devotion to duty and his behaviour was unbecoming of a Government servant. The apex Court stated that the question whether

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"unauthorised absence from duty" amounts to failure of devotion to duty or behaviour unbecoming of a Government servant cannot be decided without deciding the question whether absence is wilful or because of compelling circumstances. It was observed,

If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant. (Para 17)

5.6 The Court held that in a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in the absence of such finding, the absence will not amount to misconduct.

6. In the above facts and circumstances of the case emerging, the punishment of removal from service imposed on the plaintiff was ex facie harsh, unjust and grossly disproportionate. On the point, an Apex Court decision in Union of India and others Vs. Giriraj Sharma, applies. In that case, the employee had overstayed for 12 days beyond leave period subsequent to order of rejection of his application for extension of leave. There was no intention to flout the order and it was found not to be wilful. The Supreme Court held that punishment of removal was disproportionate. Reinstatement of the employee was ordered with grant of all monetary and service benefits and liberty was granted to the employer to visit minor punishment.

6.1 Therefore, on the facts it was clearly noticeable that overstay beyond the leave and consequential absence of the plaintiff was due to compelling circumstances and genuine reason that surgery was required to be conducted on his infant son. The absence was not deliberate, intentional or wilful. Over and above, the competent authority had passed order treating absence as period of leave without pay. In other words, absence was treated as leave. The period for unauthorised absence in such circumstances could not survive. Taking into consideration all these aspects of the matter, removal from service was not a commensurate punishment to the alleged guilt, which was in fact pardoned. The Trial Court was eminently justified in decreeing the suit in favour of the plaintiff. The first appellate court erred in allowing the appeal. Imposition of penalty of removal being shockingly harsh to the conscience and arbitrary in the facts of the case, could not have been endorsed to. The first appellate Court ought to have confirmed the findings and decision of the Trial Court.

7. It was stated that despite the order of the Trial Court setting aside punishment of removal, plaintiff was not taken back in service. It was submitted by learned

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advocate for the appellant that since the order of removal is being upheld and the first appellate court''s judgment is being set aside, as a necessary consequence, payment of backwages should follow.

7.1 In this regard, taking a clue from the decision of the Apex Court in Krushnakant B. Parmar Vs. Union of India (UOI) and Another, which in its concluding paragraph observed as under:

Taking into consideration the fact that the charged officer has suffered a lot since the proceeding was drawn in 1996 for absence from duty for a certain period, we are not remitting the proceeding to the disciplinary authority for any further action. Further, keeping in view the fact that the appellant has not worked for a long time we direct that the appellant be paid 50% of the backwages but there shall be no order as to costs. (Para 25)

7.2 Similar situation is obtained here. Though removal was set aside as per the Trial Court''s judgment and order dated 17th October, 2002, plaintiff-appellant has not worked as he was not taken in service. In that view, it is appropriate to direct that he shall be paid, instead of full backwages, 45% of the backwages payable for the period in question till he is taken back.

8. Subject to the aforesaid qualification, the impugned judgment and order dated 25th September, 2009 passed by learned Presiding Officer, Fast Track Court No. 7, Rajkot in Regular Civil Appeal No. 03 of 2004 is hereby set aside. The judgment and decree of the Trial Court shall stand, subject to above qualification regarding payment of backwages. Record and proceedings to be sent back to the Court concerned.

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