

(2016) 03 GUJ CK 0198
In the Gujarat High Court

Case No : Special Civil Application No. 3537 of 2016

Mayuddin Usmangani Khedavadavala	APPELLANT
Vs	
Union of India and Others	RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227

Citation : (2016) 03 GUJ CK 0198

Hon'ble Judges : S.R. Brahmbhatt and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : V.M. Dhotre, Advocate, for the Appellant; Mayur V. Dhotare, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Brahmbhatt, J.—1. Heard learned counsel for the petitioner. The petitioner by way of this petition has approached this Court invoking Articles 226 and 227 of the Constitution of India with following prayers.

"A. To issue a writ of certiorari or any other appropriate writ, order or direction in the nature of Certiorari quashing and setting aside the impugned Judgment and Order dated 29.09.2015 at Annexure-"H" to this petition concerning the petitioner passed by the Hon'ble Central Administrative Tribunal Ahmedabad Bench in O.A. No. 149 of 2015 with a further direction to the respondent authorities to reinstate the petitioner in service on his original post with all incidental and consequential benefits ensuing there from including the back wages in the interest of justice.

B. Pending admission, final hearing and disposal of this petition be pleased to say the further operation and execution of the impugned Judgment and Order dated 29.09.2015 concerning the petitioner passed by the Hon'ble Central Administrative Tribunal Ahmedabad Bench in O.A. No. 149 of 2015 by directing the respondents to reinstate the petitioner in service in the interest of justice.

C. To pass any other and further order/s as may be deemed fit and proper in the facts and circumstances of the case."

Thus, what is essentially under challenge is the order and judgment of the Tribunal rendered in O.A. No. 149 of 2015 and allied matter on 29.09.2015, whereunder after elaborate discussion of all the points the Tribunal was not inclined to entertain the same and dismissed the OAs.

2. Facts in brief, as could be culled out from the order as well memo of the petition, deserve to be set out as under in order to appreciate the controversy in question.

2.1 The petitioner happen to be an aspirant for the employment with the respondents and hence pursuant to the advertisement dated 29.11.2008, he submitted application. The application was submitted after the date of submission of the application and this aspect is not under dispute at all. However, the said application appears to have been entertained and as a result thereof the petitioner was issued appointment order on 02.02.2009. Pursuant whereof the petitioner resumed his duties and started functioning on the post of GDS, Packer (Gramin Dak Sevak) at Kubernagar Bungalow Area, on the same day. The concerned authorities were constrained to notice irregularities in the appointment and hence a notice, calling upon the petitioner to show cause as to why the appointment may not be cancelled, came to be issued on 02.09.2011.

2.2 The said show cause notice was assailed in O.A. No. 385 of 2011 before the Central Administrative Tribunal, Ahmedabad. During pendency whereof, the services of the petitioner came to be terminated along with other similarly situated persons on 02.11.2011, which resulted into amendment in O.A. and a prayer came to be included laying challenge to the order of the termination dated 02.11.2011. The Central Administrative Tribunal vide its order dated 07.12.2012 quashed and set aside the termination order dated 02.11.2011 and reserve the liberty to the respondents-employer to call for explanation and after following principles of natural justice and the provision of Rule 10 of the Gramin Dak Sevaks (conduct And Engagement) Rules, 2011 (hereinafter referred to as "the Rules" for the sake of brevity). It seems that the mentioning of Rule 10 of the Rules, which laid down procedure for imposing punishment under Rule 9, was perceived to be unwarranted and hence there seems to be a Review Application being Review Application No. 25 of 2013 filed by the employer, wherein on 24.10.2013, the Tribunal while allowing the Review Application reframed the sentences and deleted Rule 10 procedure as such. The petitioner appears to have been constrained to pass Execution Application also and as a result thereof a reinstatement order came to be passed on 01.11.2013. In that order itself there was an instruction to the petitioner to submit explanation qua the irregularities in the appointment.

2.3 The petitioner submitted his explanation on 30.11.2013, indicating various reasons and urging the authorities to overlook the irregularities. The petitioner

also admitted the fact that the application was in fact posted after the last date of receiving the application, but as it was lying with his neighbour, who was entrusted with the work of posting, on account of some lethargy or inaction on his part, the application had not been received by the authorities in time. The said explanation was submitted to the authorities superior to the reviewing authority also, who after elaborate reasoning decided to hold that the appointment cannot be continued on account of irregularities found in the appointment process and passed an order on 20.03.2015, which was subject matter of challenge in O.A. No. 149 of 2015, inter alia challenging the show cause notice dated 22.09.2011, the reinstatement order dated 01.11.2013, on the ground that the same could not have contained the rider for seeking explanation on the basis of the said show cause notice, which was subject matter of scrutiny by the Tribunal on earlier occasion and the order dated 20.03.2015.

2.4 The Tribunal after recording elaborate reasoning did not find any substance in the contention and hence dismissed the same vide order dated 29.09.2015, which has given cause of action for bringing about this petition under Articles 226 and 227 of the Constitution of India.

3. Learned counsel appearing for the petitioner contended that the show cause notice dated 22.09.2011 could not have been revived by the respondent authorities as the said show cause notice in fact has culminated into a termination order of 02.11.2011, which was subject matter of challenge before the Tribunal in O.A. No. 385 of 2011 in which the Tribunal vide its order dated 07.12.2012 was pleased to quash and set aside the same. Therefore, it was not open to the respondent authorities to revive the same show cause notice and in fact the respondent authorities were under obligation to issue a fresh show cause notice calling upon the petitioner to give explanation in respect of the so called show cause notice mentioned thereunder. The action of the respondent authorities in issuing the order impugned is based upon the original show cause notice dated 22.09.2011 and, therefore, the same is required to be quashed and set aside.

4. Learned counsel for the petitioner thereafter contended that the authorities could not have invoked the provision of Rule 4(3) of the Rules after the lapse of two and half years, as the Rule 4(3) of the Rules though does not contain any specific time limit and the word "any" would not empower the authority to exercise such power at any point of time. The said exercise is required to be undertaken within a reasonable time and in the instant case, the petitioner who had put in two and half years of service could not have been visited with such an exercise of power under Rule 4(3) of the Rules.

The counsel for the petitioner has submitted that this ground is though not taken before the authorities or the Tribunal is well available to be taken before this Court as it is a pure question of law and, therefore, it can be taken at any point of time. In support of his submission learned counsel for the petitioner relied upon the decisions of the Supreme Court in case of Greater Mohali Area

Development Authority And Others v. Manju Jain And Others, reported in , (2010) 9 Supreme Court Cases 157, specially relied on para 26; and in case of Collector Of Central Excise, Ahmedabad v. Pioma Industries And Imperial Soda Factory, reported in , (1997) 10 Supreme Court Cases 400, specially relied on para 2. Based upon these decisions, learned counsel for the petitioner has submitted that the ground of exercise of power under Rule 4(3) of the Rules being a pure question of law, the same is permissible to be raised in this proceeding and Court may appreciate this aspect that the employee had been working for as many as two and half years and thereafter he is sought to be visited with dire consequences of so called irregularities in the employment.

5. The third, submission canvassed at the bar was in respect of order being stigmatic and therefore the same could not have been passed without following substantive procedure for holding inquiry as envisaged under Rule 10 of the Rules for imposing punishment under Rule 9. The plain and simple reading of the order impugned in this proceeding would indicate that same attributes petitioner's role also in the irregularities involved and therefore, the same could not have been passed without following due procedure of law.

6. Fourthly, the learned counsel for the petitioner submitted that there is marked difference between irregular appointment and illegal appointment. In the instant case, if at all something is to be considered by the Tribunal, then it is only the irregularity which cannot be equated with illegality. In support of this submission, he placed reliance upon the decision rendered by the Supreme Court in case of Government of A.P. & Ors. v. V.K. Brahmanandam & Ors., reported in , AIR 2008 Supreme Court 3170.

7. The Court is of the considered view that this petition is bereft of merits and therefore it is required to be dismissed for the following reasons namely:--7.1 The fact remains to be noted that the show cause notice dated 22.09.2011, which is produced in this compilation at page No. 24, is clearly indicative of what was required to be answered by the petitioner in his explanation. For ready reference, the same show cause notice is required to be reproduced as under;

"DEPARTMENT OF POSTS - INDIA

OFFICE OF THE SR. SUPERINTENDENT OF POST OFFICES

CITY DIVISION, AHMEDABAD - 380 009

Memo No. SSPOs/Inv./ASPOs-Sub Dn./10-11 dated 22.09.2011

NOTICE

Whereas said Shri M.U. Khedavadavala was appointed as GDS Packer Kubernagar BA PO by Shri I.A. Vora, the then Asst. Supdt. of Posts, North Sub. Dn. Vide memo No. B/PF/MUK/GDS/Provisional/08-09 Dated 02/02/09.

AND WHEREAS the undersigned/Reviewing authority while scrutinizing the documents/files related to the recruitment made for the post of GDS Packer

Kubernagar BA PO, it is found that the selection of Shri M.U. Khedavadavala as GDS Packer is not regular.

WHEREAS said Shri M.U. Khedavadavala had not filed the application in prescribed proforma. The column-post applied for was left blank. The documents attached with the application were not attested as mentioned in para No. 3(2) of the notification. The application without date made by Shri Khedavadavala was posted by him through Speed Post No. EG.722438129IN dated 23/12/2008 and received at the office of Asstt. Supdt. of Posts, North Sub Dn. Ahmedabad on 24/12/2008. While the closing date of submission of application for the post on which he was appointed was 15.12.2008. Further the selection was made on the strength of inadequate number of effective applications.

WHEREAS the undersigned as Reviewing Authority considers the said recruitment as irregular and liable for termination.

NOW THEREFORE, Shri Khedavadavala is hereby given an opportunity to make representation against proposed action. Such a representation, if any, should be made in writing and submitted so as to reach the undersigned not later than fifteen days from the date of receipt of this memo by Shri Khedavadavala.

The receipt of this memo should be acknowledged.

Sr. Supdt. Of Post Offices City Division, Ahmedabad-380 009.

Copy to : Regd.AD Shri M.U. Khedavadavala GDS Packer Kubernagar BA PO Attached to Kubernagar PO."

This show cause notice, as it is stated hereinabove, culminated into termination order dated 02.11.2011. The said order was passed in exercise of Rule 8 of the Rules, which is required to be reproduced as under;

"Rule 8: Termination of Engagement

(1) The engagement of a Sevak who has not already rendered more than three years continuous employment from the date of his engagement shall be liable to be terminated at any time by a notice in writing given either by the Sevak to the Recruiting Authority or by the Recruiting Authority to the Sevak;

(2) The period of such notice shall be one month:

Provided that the service of any such Sevak may be terminated forthwith and on such termination, the Sevak shall be entitled to claim a sum equivalent to the amount of Basic Time Related Continuity Allowance plus Dearness Allowance as admissible for the period of the notice at the same rates at which he was drawing them immediately before the termination of his service, or, as the case may be, for the period by which such notice falls short of one month."

The order is also required to be set out as under;

"DEPARTMENT OF POSTS - INDIA

OFFICE OF THE SR. SUPERINTENDENT OF POST OFFICES

CITY DIVISION, AHMEDABAD - 380 009

Memo No. SSPOs/Inv/ASPOs-Sub Dn./10-11 dated 02/11/2011

The matter of your irregular appointment was brought to your notice and the relevant documents were shown to you under your acknowledgment dated 25/08/2011. You have also stated your views about the matter on dated 25/08/2011. The show cause notice as to why services should not be terminated has also been served to you in bilingual i.e. English and Gujarati vide this office letter of even No. dated 22/09/2011 & 07/10/2011. Your representation has not been received after lapse of reasonable period. Therefore the matter has been reviewed on the basis of relevant documents available on records and it is concluded that your appointment as GDS Packer Kubernagar BA PO is irregular and contrary to the rules being in force.

In pursuance of the provision to Rule 8 of Department Of Posts Gramin Dak Sevak (Conduct and Employment) Rules, 2001, I Pawan Dalmia, Sr. Superintendent of Post Offices, City Division, Ahmedabad-380 009 hereby terminate (forthwith) the services of Shri M U Khedavadavala, GDS Packer, Kubernagar BA PO, Ahmedabad :382 340 and direct that he shall be entitled to claim a sum equivalent to the amount of his basic allowance plus dearness allowance for the period of notice at the same rates at which he was drawing them immediately before the termination of his service, or, as the case may be, for the period by which such notice falls short of one month. The due amount of basic allowance plus dearness allowance is being remitted in lieu of the notice of one month or for the period by which such notice falls short of one month.

Station-: Ahmedabad

Date-: 02/11/2011

Sd/- (Pawan Kumar Dalmia) Sr. Supdt Of Post Offices City Division, Ahmedabad-380 009"

This order was not forming part of the compilation, but the learned counsel for the petitioner presented this order during the course of submission, which is taken on record.

This order was passed in exercise of Rule 8, which was in fact quashed by the Tribunal. It is pertinent to note that the Tribunal termed this order to be a stigmatic and quashed only this order, but did not quash the show cause notice dated 22.09.2011. The Tribunal's order passed in earlier proceeding of O.A. No. 385 of 2011 would make it abundantly clear that the Tribunal also after adverting to the facts did not hold that the show cause notice dated 22.09.2011 was in any manner illegal or without any jurisdiction. In fact the Tribunal did reserve liberty to the employer to initiate action, but in accordance with the principles of natural justice, as the order of termination was found to be stigmatic, which warranted

following of proper procedure and hence the termination order dated 02.11.2011 was only quashed and not the show cause notice.

7.2 It will not be out of place to reproduce the Tribunal's observations in the earlier order dated 07.12.2012, which read as under;

"Para-6. In the present OAs, we find that both in the notice as well as in the order of termination, reasons have been assigned. These orders cannot be treated as a simply order terminating the services of the GDS in as much as these orders are stigmatic. If at all reasons have to be assigned for terminating the services of the GDS, it would be necessary both the from the point of view of natural justice, as well as in the light of the provisions of the GDS (Conduct and Employment) Rules that reasonable opportunity is provided to the concerned GDS to defend himself. In such cases, the requisite procedure would have to be adopted as specifically laid down under Rule 10 of the GDS (Conduct and Employment) Rules for imposing any of the penalties, provided under Rule-9 of these Rules.

Para-7. In the instant case, as has been noted above, the orders terminating the services of the applicants are not in consonance with the provisions of Rule 8 of the GDS (Conduct and Employment) Rules. Simple notice of termination could have been passed, but in the present case, the reasons having been disclosed, the order is stigmatic.

Para-9. For the reasons aforementioned, the impugned orders issued by the respondents in all these OAs terminating the services of the applicants cannot be legally sustained and are, accordingly, quashed and set aside. The applicants shall have to be reinstated in service forthwith. It shall, however, be open to the respondents to pass fresh orders in consonance with the provisions of the rules and the principles of natural justice, if so advised. Any such order shall be passed within four months from the date of receipt of a copy of this order. Other contentions made by the parties are, as such, kept open."

Thus, the Tribunal was conscious that as the order of 02.11.2011 was found to be stigmatic the procedure of natural justice was required to be followed and hence incorporated in its order the direction for procedure to be followed as envisaged under Rule 10 of the Rules. However, Rule 10 of the Rules appears to be a Rule to be followed in a case where a substantive penalty is proposed to be imposed as envisaged under Rule 9 and hence in the proceeding of Review Application No. 25 of 2013, the Tribunal rendered order on 24.10.2013 reframing the sentence which is reproduced in this compilation at page No. 32, which read as under;

"Para-2. These RAs have been taken up with the mutual consent of learned counsel for both the parties.

Para-3. Since all OAs were heard together and common orders have been passed hence, the review applications have also been heard together and are being

disposed of through common orders.

Para-4. We find that the last sentence of para-6 of the common impugned order dated 7-12-2012 in OA/378/2011 to OA/385/2011 would need reconsideration, which reads as under:

"In such cases, the requisite procedure would have to be adopted as specifically laid down under Rule 10 of the GDS(Conduct and Employment) Rules for imposing any of the penalties, provided under Rule-9 of these Rules."

Para-5. We feel that the purpose would be served by reframing the sentence as under:

"In such cases, the requisite procedure would have to be adopted as specifically laid down under the GDS (Conduct and Employment) Rules."

The rest of the common order in the related OAs remain as earlier."

The said reframing of the sentence and taking out Rule 10 of the Rules would clearly indicate that the question of full-fledge inquiry, as envisaged for imposing punishment under Rule 9 and 10, were out of question and the said order has attained its finality, as no one has challenged the same. The said order, therefore, makes it abundantly clear that there was no scope to challenge to the show cause notice dated 22.09.2011 nor was there any scope in seeking any full-fledged inquiry as envisaged under Rule 10, as the entire proceedings were based upon the initial irregularities at the end of the employing authority in issuing the employment orders and the selection procedure.

7.3 Therefore, there was hardly any scope for seeking any other course, then the one which was available under the law. This would, in our view, answer the challenge to the revival of show cause notice as the show cause notice had not been in fact quashed and set aside. The reliance upon the decision of the Supreme Court in case of *Hukumdev Narain Yadav v. Lalit Narain Mishra*, reported in , (1974) 2 Supreme Court Cases 133, is of no avail to the petitioner, as the entire observation of the Supreme Court touches upon the aspect of the order which had in fact violated the principle enshrined under the provision of fundamental rights. Whereas, in the instant case, the same analogy is not available to challenge the action based upon the original show cause notice dated 22.09.2011 on the ground that the resultant order of 02.11.2011 has been quashed.

7.4 The reproduction of the observation of the Tribunal in the order passed in earlier O.A. on 07.12.2012 itself would not sufficiently clear to hold that there existed no scope for any challenge to the revival or so called revival of show cause notice dated 22.09.2011 rather one would appreciate that the said notice was permitted to be proceeded with, as the reinstatement order of 01.11.2013 has also not been challenged by the petitioner. The petitioner has accepted the same and surrendered himself in replying to the explanation. Had the said order been found to be incorrect or not proper, nothing prevented the petitioner from

questioning the same in appropriate proceedings. The questioning of the said order in the subsequent proceedings, when the ultimate order of termination came to be passed, is of no avail as even otherwise also, as it is stated hereinabove, the said order cannot be said to be faulty in any manner so as to require any further scrutiny. The reasoning adopted by the Tribunal for upholding the action based upon 22.09.2011 show cause notice are not in any manner faulty so as to call for any interference.

7.5 This brings the Court to consider the challenge on the ground of invocation of Rule 4(3) of the Rules. The said Rule read as under;

"Rule 4(3): Notwithstanding anything contained in these rules, any authority superior to the Recruiting Authority as shown in the Schedule, may, at any time, either on its own motion or otherwise call for the records relating to the engagement of Gramin Dak Sevaks made by the Recruiting Authority, and if such Recruiting Authority appears-

(a) to have exercised a jurisdiction not vested in it by any law or rules time being in force: or

(b) to have failed to exercise a jurisdiction so vested: or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, such superior authority may, after giving an opportunity of being heard, made such order as it thinks fit."

7.6 The irregularities mentioned in the proceedings and the fact that the author of the order while rendering the order dated 20.03.2015 seems to be elaborately clear qua the inability of the authority in condoning the irregularities, as it did effect the entire selection procedure and the recruitment process. The Court need not elaborately go into it, but falling on the ground from the said order would make it abundantly clear as to why and how the same was required to be taken in the correct proceedings and, therefore, the ground urged before the Court that it being the question of law can be urged is also of no avail to the petitioner. There cannot be any dispute to the proposition of law that pure question of law can be permitted to be raised at any point of time. But, in the instant case, a question arises as to whether can this be considered to be a pure question of law which required no foundation being led before the authorities, then the answer would be in emphatic "no", as it was a bounden duty cast upon the petitioner to challenge the authority and the show cause notice on the ground that the said review was not permissible. In that situation, there would have been an opportunity to the authorities to come forward and produce on record the material, which would indicate that in case if there is an irregularity in the recruitment process, which would affect the right of eligible and more deserving candidates, then the same would not brook any ground of delay to sustain the same.

7.7 In the instant case, the admitted facts writ large on the record, would

indicate that those irregularities were not capable of being condoned in any manner, as it results into depriving the legitimate deserving candidates on being competing and appointing on the post. Therefore, we are not impressed upon by the submission. Hence, the same is also required to be negated.

8. This brings the Court to consider as to whether the order impugned said to be stigmatic. The entire reading of the order and plethora of opportunity available to the petitioner to explain his conduct were sufficient to indicate that the same cannot be said to be a stigmatic and the petitioner was given ample opportunity to respond thereto. But, as it is stated hereinabove, the irregularities which were not disputed, cannot be condoned and therefore, the order, in our view, did not call for any interference and the Tribunal's order is, therefore, absolutely just and proper. As a result thereof, petition fails and is accordingly rejected.