

(2016) 02 GUJ CK 0188

In the Gujarat High Court

Case No : Special Civil Application No. 7590 of 1998

Pratapdan Ravjidan Gadhvi

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 23-02-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 311, Article 311(1), Article 311(2)
Prevention of Corruption Act, 1988 — Section 13(1)(d), Section 13(2), Section 7

Citation : (2016) 2 GCD 1770 : (2016) LIC 2449

Hon'ble Judges : V.M. Pancholi, J.

Bench : Single Bench

Advocate : Jigar G. Gadhavi and Archit P. Jani, Advocates, for the Appellant;
Swapneshwar Goutam, AGP, for the Respondent

Final Decision : Partly Allowed

Judgement

V.M. Pancholi, J.—1. By way of this petition under Article 226 of the Constitution of India, petitioner has prayed that the orders dated 25.06.1998 and 31.07.1998 passed by respondent No. 2 be quashed and set aside and thereby respondents be directed to reinstate the petitioner to his original post.

2. Heard learned advocate Mr. Jigar Gadhavi for the petitioner and learned AGP Mr. Swapneshwar Goutam for the respondents.

3. It is the case of the petitioner that he was appointed as Armed Police Constable on 29.04.1970. Thereafter he was promoted as Armed Police Head Constable in 1991. In July-1995, when he was working as traffic Police Head Constable, FIR came to be registered against him by the Police Inspector, ACB. Thereafter the said case was conducted in the Court of learned Special Judge, Ahmedabad and at the end of the trial petitioner has been convicted for the offence punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act. It is further the case of the petitioner that thereafter on the basis of the order of conviction passed by criminal Court, respondent No. 2 passed an order on 25.06.1998 under the provisions of Article 311 of the Constitution of

India, whereby the petitioner was dismissed from service. Against the said order of conviction passed by the trial Court, petitioner preferred Criminal Appeal No. 392 of 1998 before this Court. This Court initially by an order dated 14.07.1998 suspended the order passed by the Sessions Court till final disposal of the appeal. Respondent No. 2, therefore, passed an order on 27.07.1998 whereby the order of dismissal was stayed. However, once again by another order dated 31.07.1998, respondent No. 2 revived the order of dismissal which was passed on 25.06.1998. At that stage this petition was preferred. However, during the pendency of this petition, now, Criminal Appeal No. 392 of 1998 preferred by the petitioner is allowed by this Court by an order dated 25.02.2011 and thereby quashed and set aside the order of conviction dated 17.04.1998 passed by the Special Judge, Ahmedabad in Special Case No. 12 of 1996.

4. Learned advocate Mr. Jigar Gadhavi appearing for the petitioner mainly contended that respondent No. 2 passed the impugned order only on the basis of the order of conviction passed by Special Judge, Ahmedabad by which the petitioner has been convicted for the offence punishable under the provisions of the Prevention of Corruption Act. However, respondent No. 2 has not initiated any departmental inquiry against the petitioner. Thus, merely relying upon the order of conviction passed by the criminal Court, impugned order was passed by respondent No. 2. Learned advocate would submit that now when the said order of conviction of the petitioner passed by the learned Special Judge, Ahmedabad, is quashed and set aside by this Court in the aforesaid criminal appeal, the impugned order is required to be quashed and set aside. At this stage, learned advocate for the petitioner submitted that during the pendency of the present petition now the petitioner has also attained the age of superannuation. He, therefore, submitted that now the department cannot initiate the departmental inquiry against the petitioner at this belated stage for the said alleged incident and therefore when this Court has acquitted the petitioner, the impugned order of dismissal passed by respondent No. 2 be quashed and set aside and the respondents be directed to give all the consequential benefits to the petitioner.

5. In support of his submission, learned advocate for the petitioner has placed reliance upon the decision rendered by the Hon"ble Supreme Court in the case of State Bank of India & Anr. v. Mohammed Abdul Rahim, reported in , JT 2013 (14) SC 120 as well as the decision of this Court in the case of Bachubhai N. Patel v. State of Gujarat & Ors., reported in , 2014 (2) GCD 1539.

6. On the other hand, learned AGP Mr. Goutam has mainly contended that merely because the petitioner is acquitted by this Court, that does not mean that the order of dismissal would automatically be cancelled. He submitted that the competent criminal Court had convicted the petitioner for the offence punishable under the provisions of the Prevention of Corruption Act and on the basis of the said order respondent No. 2 passed an order of dismissal. Learned AGP submitted that if the acquittal is clean acquittal and not on the basis of the benefit of doubt, in such case, Court may consider the case of the petitioner and

not otherwise. He has further submitted that it is open for the department to initiate the departmental proceedings even after passing of the order of acquittal by the competent Court and the burden of proof in both the proceedings is different. He has placed reliance upon the following decisions:

"(1) the decision of Hon"ble full Bench of this Court in the case of P.D. Waghela & Ors. v. G.C. Raiger, Deputy I.G.P. & Ors., reported in , 1994 (1) GLR 240.

(2) the decision of Hon"ble Supreme Court in the case of State of West Bengal and Ors. v. Sankar Ghosh, reported in , (2014) 3 SCC 610."

7. Having considered the submissions canvassed on behalf of the learned advocates for the parties and having gone through the material produced on record and the decisions relied upon by the learned advocates for the parties, it has emerged from the record that while passing the impugned order of dismissal of the petitioner, respondent No. 2 has only relied upon the order dated 17.04.1998 passed by the Special Judge, Ahmedabad in Special Case No. 12 of 1996 whereby the petitioner has been convicted for the offence punishable under the provisions of the Prevention of Corruption Act. Before passing the order of dismissal of petitioner from service, respondent No. 2 has not initiated any departmental inquiry against the petitioner for the alleged charge. This Court by an order dated 25.02.2011 passed in Criminal Appeal No. 392 of 1998 quashed and set aside the order dated 17.04.1998 passed by the learned Special Judge, Ahmedabad in Special Case No. 12 of 1996 and thereby acquitted the petitioner. The order passed by this Court is not challenged before the higher forum and the same has attained finality. It is also revealed from the record that during the pendency of the present petition, petitioner has already attained the age of superannuation and as on date he is more than 67 years of age. It is not the case of the respondents that after the criminal appeal is allowed and order of conviction is quashed by this Court, any departmental proceedings were initiated by the respondents against the petitioner. Thus, the fact remains that the impugned order was passed only on the basis of the order of conviction passed by the concerned criminal Court.

8. This Court in the case of Bachubhai N. Patel (supra) has observed and held in para 8, 9 and 10 as under:

"8. I am unable to accept the submission of Ms. Mandavia for the reason that there is no material on record to show that a full fledged inquiry was ever conducted, pursuant to which the order dismissing the petitioner from service was passed. It is an admitted position that the departmental inquiry, in the instant case, was short-circuited. This Court, even for a moment, is not suggesting that the Disciplinary Authority cannot hold departmental inquiry. The issue in the case on hand is reinstatement of the petitioner. The Hon"ble Apex Court, recently, in the case of "State Bank of India v. Mohammed Abdul Rahim", , 2013 (14) JT 120, held as under at Para-11;

"11. The respondent was acquitted on 22.02.2002; the demand for

reinstatement was made by him on 22.04.2002 and he was reinstated in service by the appellant bank on 07.11.2002. On the view that we have taken, at the highest, what can be said in favour of the respondent is that he is entitled to wages from the date he had lodged the demand for the same following his acquittal, namely, from 22.04.2002; until the date of his reinstatement, if the same has not already been granted by the appellant bank."

9. In the case on hand, the petitioner was acquitted by the learned Sessions Judge, Vyara, on 12.02.2009, and hence, the respondent authorities were not justified in not reinstating the petitioner. Thus, in view of the above the decisions relied on by Ms. Pathak would not apply to the facts of the case on hand and the order dated 30.09.2008 cannot be sustained in the eye of law and this Court is inclined to quash and set aside the same.

10. In the result, this petition is ALLOWED. The order dated 30.09.2008 passed by respondent No. 3 is quashed and set aside. The respondent authorities are directed to reinstate the petitioner, FORTHWITH. Insofar as the back-wages and other consequential benefits are concerned, the respondent authorities shall consider and decide the same at the earliest and in accordance with law. Rule is made absolute to the aforesaid extent. No order as to costs. Direct service is permitted."

9. The Hon"ble Supreme Court in the case of State Bank of India (supra) has observed in para 8, 9 and 11 as under:

"8. Before delving into the contentious issues arising from the arguments advanced, the issue with regard to the applicability of the provisions of the Sastry Award may be dealt with in the first instance. According to us, the said provisions do not have any special significance inasmuch as there can be no doubt on the proposition that on the very same facts that give rise to a criminal offence it is always open to the employer to initiate a departmental proceeding which option the employer may or may not exercise. In the event the employer chooses to initiate a departmental proceeding, it would be open for such an employer to take disciplinary action against the erring employee if the charges levelled are found to be substantiated notwithstanding the acquittal of the employee in the criminal case that may have been lodged against him. This is on the principle that standard of proof in a criminal case and a departmental proceeding is different. However, in a case where the employer chooses not to initiate a departmental proceeding and acts only on the basis of the conviction in the criminal prosecution, he would be bound by the final verdict in the same, i.e., in case of a reversal. The provisions of the Sastry Award, relied upon on behalf of the respondent, therefore, does not in any manner alter the basic principles surrounding the initiation of a criminal action and a departmental enquiry on the same set of facts and the consequences thereof.

9. In the present case, the respondent was acquitted by the appellate Court. There can be no manner of doubt that the said acquittal would relate back and

the initial order of conviction would stand obliterated. On that basis, there can be no manner of doubt that the substratum of the cause that had led to the respondent's dismissal/discharge in the present case had ceased to exist. The same would entitle him to be reinstated in service, an act that has been duly performed by the appellant-bank.

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11. The respondent was acquitted on 22.02.2002; the demand for reinstatement was made by him on 22.04.2002 and he was reinstated in service by the appellant bank on 07.11.2002. On the view that we have taken, at the highest, what can be said in favour of the respondent is that he is entitled to wages from the date he had lodged the demand for the same following his acquittal, namely, from 22.04.2002, until the date of his reinstatement, if the same has not already been granted by the appellant bank."

10. Keeping in mind the aforesaid observations made by this Court as well as Hon"ble Supreme Court, in the facts and circumstances of the present case it can be said that when the impugned order is passed only on the basis of the order of conviction passed by the criminal Court and when the said order is quashed and set aside by this Court in criminal appeal, the impugned order of dismissal from service of the petitioner cannot sustain and deserves to be quashed and set aside.

11. The decision rendered by the Hon"ble Full Bench of this Court in the case of P.D. Waghela (supra) relied upon by learned AGP is in fact helpful to the petitioner. In the said decision, the Hon"ble Full Bench of this Court has observed and held in para 14 and 16 as under:

"14. In Kunwar Bahadur v. Union of India and Ors., a Full Bench of the High Court of Allahabad dealt with a case, the facts of which ran as follows:

On 17-5-1956, the servant was convicted for taking a bribe. On 21-5-1956, the services of the servant were terminated and no opportunity to show cause as provided in Article 311(2), was given to him. The servant appealed against his conviction and the appeal was allowed on 9-4-1957. The servant instituted a suit for a declaration that the order of termination of his services is void and he must be held to have continued in service. His plea was countenanced and the Full Bench answered the question posed before it in his favour. The question, the Full Bench was called upon to answer, was as to whether the servant was entitled to the protection of Clause (2) of Article 311. Oak, J. spoke thus on the question:

...Now, it is always open to Government to pass an order of dismissal or removal from service immediately after a Criminal Court records conviction. In that case the administration runs the risk of the conviction being later set aside in appeal or revision. It is for the administration to decide whether in a particular case it should pass an order of dismissal or removal immediately after conviction by the trial Court, or wait for the result of a possible appeal or revision. Such

considerations of expediency can have little bearing on the interpretation of Article 311 of the Constitution.

...My answer to the question of law referred to the Full Bench is this. In the circumstances of the present case, the respondents are not entitled to the benefit of Sub-clause (a) of the proviso to Article 311(2), and the plaintiff-appellant is entitled to the protection of Clause (2) of Article 311 of the Constitution....

Dwivedi, J. opined that where a conviction is set aside by a Court in appeal or revision, it is difficult to say that the conduct has resulted in or led to his conviction. The further passage in the judgment of Dwivedi, J. requires extraction as follows:

...Let us now examine the context and scheme of Clause (a). It is associated with Clauses (b) and (c) of the proviso. Clause (b) dispenses with the hearing requirement of Article 311(2) when it is impracticable, for instance, when the employee is absconding. Clause (c) dispenses with hearing when it is inexpedient in the interest of the security of the State. There are judicially recognized areas where the audi alteram partem rule does not operate: S.A. de Smith, Judicial Review of Administrative Action (1959 Edn) pages 119 and 121. In the context of Clauses (b) and (c) Clause (a) appears to exclude the said rule because after conviction in a Court of law it is considered to be inessential. It is supposed that this area exclusion inheres in the principle of natural justice which assures the essence of justice or "rational justice". The reason for the exclusion of hearing is that the misconduct of the employee has already been proved in a regular trial in the Court of law. But this reason disappears where the conviction is upset in appeal or revision. The finding of guilt is then gone, and the misconduct remains unproven. The reason disappearing, the exclusion of hearing becomes unjust and unfair.

The learned Judge held:

"...Having regard to the language, context and scheme of Clause (a) and to its serious impact on the employees' right to livelihood I concur with the opinion of Sri Justice Oak."

Gangeshwar Prasad, J., expressed his reasoning as follows:

"...So long as a conviction remains liable to be set aside it cannot be said to be determinate in its nature and its legal consequences, whether the conviction is already in question before a superior Court or not. The state of things created thereby is liable to change and, naturally, an order of dismissal which seeks to justify its non-compliance with the requirement of Article 311(2) on the basis of such a conviction stands upon an insecure foundation. The order cannot have a higher validity than the conviction from which it derives its precarious justification and it must remain subject to the ultimate shape which is given to the state of things by the order of the superior Court before which the conviction

is challenged. If the conviction is set aside, the state of things is made to undergo a change not merely from the date of the setting aside of the conviction but from the date of the conviction itself. Indeed, a finding of guilt recorded against a person cannot be said to have been effectively set aside if the reversal and the setting aside were to operate only from the date when the order to that effect is made and the person concerned were to be, even thereafter, regarded as having remained guilty and convicted till then. Such an order, whenever it may come to be made, has the effect of wiping out the winding of guilt and the conviction altogether. Whether a person was entitled to the safeguard provided by Article 311(2) and whether he has had the benefit of that safeguard are justiciable matters and it should, therefore, follow that when a Court is called upon to decide these matters it has to see whether, in the light of the final outcome of the criminal proceeding in respect of the conduct for which the said person was dismissed. It can be said that the proceeding had led to his conviction - If it is found that the conviction was subsequently set aside, it must, in my opinion, be held that at no point of time was the person concerned a person whose conduct, on the ground on which he was dismissed from service, had led to his conviction...."

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16. Though not on the subject of service law, yet we are obliged to advert to a pronouncement of the Supreme Court in *Vidya Charan Shukla v. Purshottam Lal Kaushik*, where the significance of an acquittal was taken note of in the context of a disqualification, which a returned candidate was asked to face on the date of scrutiny of his nomination papers in consequence of imposition of sentence. The Supreme Court held that the acquittal of a candidate, during the pendency of an election petition, wipes out the disqualification from the date of scrutiny. Thus, there are pronouncements in the sphere of remedial measures after the conviction is wiped out by the appellate or the revisional forum. The very conviction having been rooted out, any result solely resting on it must go. The repercussions generating from such conviction having been completely knocked out from the inception, the other Constitutional protection under Clause (2) of Article 311, which must be otherwise available must be held to have been breached."

12. Thus, it is clear that as per Article 311(2) no person as notified under Article 311(1) shall be dismissed or removed or reduced in rank except after an inquiry and after giving reasonable opportunity of being heard in respect to the charges levelled against him. However, the second proviso provides that this clause shall not apply where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on criminal charge. Moreover, when the employee has been dismissed on the ground of his conviction by the competent Criminal Court, as per the aforesaid decision rendered by the Hon'ble Full Bench, merely because an appeal or revision is pending that does not mean that an opportunity of hearing is required to be given to the employee or inquiry

is required to be conducted. However, in the criminal appeal filed by the employee, if the order of conviction is set aside, the punishment of dismissal imposed by the employer would be liable to be reversed. However, it is clarified that it is always open for the employer to conduct disciplinary proceedings even after order of acquittal is passed by the competent criminal Court but in absence of any inquiry and in case of acquittal of an employee, the order of punishment in the form of dismissal passed by the employer must go.

13. The another decision relied upon by the learned AGP rendered by the Hon"ble Supreme Court in the case of State of West Bengal & Ors. (supra) would not be applicable to the facts of the present case because in the said case though the employee was acquitted in the criminal proceedings, for identical charges departmental inquiry was conducted and therefore the Hon"ble Supreme Court held that merely because the delinquent has been acquitted by the criminal Court, on same charges he cannot be automatically reinstated. However, in the present case, as observed hereinabove, no such departmental inquiry was conducted by the department. Therefore, reliance placed by the learned AGP on the said decision is misconceived.

14. In view of the aforesaid discussion, the petition is partly allowed and the impugned orders dated 25.06.1998 and 31.07.1998 passed by respondent No. 2 are hereby quashed and set aside. However, since the petitioner has already attained the age of superannuation, there is no question of his reinstatement. However, as the orders of dismissal of the petitioner are quashed and set aside, the respondents are directed to count the service of the petitioner till the date of his superannuation in continuity only for the purpose of retiral benefits. However, it is made clear that petitioner is not entitled to claim any wages during the period between the date of order of dismissal till the date of his superannuation and as observed hereinabove the said period is required to be counted only for the purpose of his retiral benefits. Rule is made absolute to the aforesaid extent. No order as to costs.