

(2010) 10 BOM CK 0273
In the Bombay High Court
Case No : Writ Petition No. 2051 of 2001

Savita More

APPELLANT

Vs

Divisional Controller Maharashtra State Road Transport
Corporation and Others

RESPONDENT

Date of Decision : 04-10-2010

Acts Referred:

Citation : (2011) 2 ALLMR 707 : (2011) 1 MhLj 903

Hon'ble Judges : S.A. Bobde, J;Mridula Bhatkar, J

Bench : Division Bench

Advocate : A.S. Chandurkar, for the Appellant; S.C. Mehadia, for the Respondent

Judgement

S.A. Bobde, J.—The Petitioner, a widow has challenged the order dated 21-12-1999 by which the Divisional Controller, Maharashtra State Road Transport Corporation, Amravati has reviewed and set aside earlier order passed by the Competent Authority in Petitioner's favour. By the earlier order it was held by the Appellate Authority that the punishment of dismissal imposed on Petitioner's husband was illegal. It was, therefore, set aside by conferring all benefits on him.

2. Ganesh Bhaurao More worked as a conductor with the Respondent - Maharashtra State Road Transport Corporation, Amravati. Apparently, he remained absent and by order dated 26-11-1996 he was dismissed from service. He expired on 24-12-1996.

3. His widow, the Petitioner preferred an appeal on 19-9-1997 and pointed out two things. Firstly, that the proceedings against her late husband had been conducted ex parte and secondly that he had been suffering from a disease of liver and that he had submitted a medical certificate to that effect to the Depot Manager. She, therefore, submitted that the absence was fully explainable and dismissal was not justified, the Divisional Controller of the Maharashtra State Road Transport Corporation, who heard the appeal, held that there is a clear non compliance of the rule of natural justice and the ex parte decision was not

justified. He also held that the Competent Authority ought not to have imposed the punishment of dismissal straightway without even considering the application which had been made by the employee about his illness. The Appellate Authority, thus, came to the conclusion that the punishment is not proper and though the Petitioner's late husband cannot be reinstated in service because of his demise, he will be entitled to all service benefits and the period from the date of dismissal till his death will be considered as leave without pay.

4. Thereafter, the said Appellate Authority, suo motu reviewed the order and set aside. Thereafter, it appears that the Petitioner made an application on 30th December, 1997 for appointment on compassionate ground and enclosed a school leaving certificate to the same authority. Instead of considering the Petitioner as entitled for compassionate appointment, it seems that the Divisional Controller suo motu reviewed the earlier order and set aside on the ground that the Petitioner could not have preferred an appeal since there was no provision in the Service Rules whereunder a member of the family could prefer an appeal.

5. Mr. Chandurkar, learned Counsel for the Petitioner submitted that there was no power of review conferred upon the Appellate Authority by the Conduct, Discipline and Procedure Rules framed by the Maharashtra State Road Transport Corporation.

6. There is no dispute by the learned Counsel for the Respondent Shri S.C. Mehadia that there is no specific rule conferring any power of review on the Divisional Controller. In fairness, the learned Counsel for the Respondent did not contend that there was inherent power of review. In any case, it is well settled that the power to review the decision is not inherent power and must be conferred by the Statutes or the Rules governing the procedure. We, thus, have no hesitation in upholding the contention of the learned Counsel for the Petitioner and setting aside the decision on this ground.

7. The next contention of the learned Counsel for the Petitioner is that in any event a widow was entitled to challenge the illegal and unjust action of the Respondent-employer in imposing penalty of dismissal and the maxims "*Actio personalis moritur cum persona*" had no application to the said situation. The learned Counsel for the Petitioner relied on the decision of the Supreme Court in Shri Rameshwar Manjhi (Deceased) Through his son Rameshwar Manjhi (Deceased) through his son Lakhiram Manjhi Vs. Management of Sangramgarh Colliery and others, ; Smt. Sudha Shrivastava Vs. Comptroller and Auditor General of India, and on a decision of Single Judge of this Court in Vasant Ramrao Ratnaparkhi and Ors. v. Presiding Officer, School Tribunal and Ors. 2003 Supp 2 BCR 629 in support of his contention.

8. In view of the decision on the first point, we think it is not necessary to decide this point. However, we note that the Petitioner was entitled to claim the reliefs which she had sought before the Appellate Authority, undisputedly being the heir of the deceased. The decision of the Supreme Court in Sudha Shrivastava

(supra) is apposite and it must be held that the appeal preferred by the Petitioner was maintainable. We are constrained to observe that there was no reason for the Appellate Authority to review its earlier decision only because the Petitioner asked for an appointment on compassionate ground. When the Petitioner did so, the authority suddenly seems to have rectified its "mistake" that the Petitioner had no right to make a grievance against the unjust dismissal of her late husband. The authority led itself to act with such unreasonableness that it might almost be said to have been done in bad faith.

9. In a case of Smt. S.R. Venkataraman Vs. Union of India (UOI) and Another, , the Supreme Court observed as follows:

7. The principle which is applicable in such cases has thus been stated by Lord Esher M.R. In *The Queen on the Prosecution of Richard Westhrook v. The Vestry of St. Pancras* (1890) 24 QBD 371 at p. 375:

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

This view has been followed in *Sedler v. Sheffield Corporation* (1924) 1 Ch. 483.

8. We are in agreement with this view. It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another.

9. The influence of Extraneous matters will be undoubted where the authority making the order has admitted their influence. It will, therefore, be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the public interest, to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power.

10. The circumstance of this case volunteers inference that the exercise of power to review a decision without having any power and based on a mistaken belief though must be vitiated by mala fide in law. We accordingly, set aside the impugned order dated 21-12-1999.

11. Mr. Mehadia, the learned Counsel for the Respondents submitted that the Petitioner's application for appointment on compassionate ground cannot be considered since the Petitioner's candidature might have become barred by age. Since the Respondents are not certain as to the stand, we direct that the Petitioner shall be considered for appointment on compassionate ground unless

she is barred by age and if the Petitioner is barred by age then we direct the Respondent to consider the candidature of the Petitioner's son or daughter in accordance with the Rules governing compassionate rule.

Rule is made absolute in the above terms. The earlier order dated 16-12-1997 is restored.