
(2009) 12 GAU CK 0073
In the Gauhati High Court
Case No : Writ Petition (C) No. 32 of 2009

Sh. P. Malsawma

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 02-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 311

Citation : (2010) 3 GLR 787 : (2010) 2 GLT 189

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Advocate : C. Lalramzauva, A.R. Malhotra and K. Laldinliana, for the Appellant;
Dinari T. Azyu, for the Respondent

Final Decision : Dismissed

Judgement

U.B. Saha, J.—The instant writ petition is filed by the petitioner, a Gram Sevak, working under the Department of Agriculture, Government of Mizoram for quashing and/or setting aside the letter dated 26.8.2002, whereby and wherein the Deputy Secretary to the Govt. of Mizoram, conveyed the approval of the Government of Mizoram to the Director of Agriculture and Minor Irrigation (respondent No. 3 herein) regarding reinstatement of the petitioner in his service with retrospective effect from 1.7.1981 without any arrears of pay and allowances but only for fixation of his pay and pensionary benefit purely on humanitarian ground, and the office order dated 10.9.2002 (Annexure-4 to the writ petition) by which the petitioner was informed that he will be paid pay and allowances as admissible under rules w.e.f. the date of his joining in service, i.e., 26.8.2002 and the letter dated 20.3.2009 whereby and whereunder the petitioner was informed that the principle of "no work no pay" shall be applied in his case and the payment of pay and allowances for the period from 1.7.1981 till 10.9.2002 cannot be considered, so far he has been denied the benefit of pay and allowances till the date of his reinstatement in service, i.e. 10.9.2002 and also for a direction to treat the said period of his absence as on duty and pay him

his arrear pay and allowances for the said period.

2. Heard Mr. C. Lalramzauva, learned Counsel for the petitioner as well as Mrs. Dinari T. Azyu, learned Government Advocate for the State respondents.

3. The pleaded case of the petitioner in the writ petition in short is as follows:

The petitioner was initially appointed to the post of Gram Sevak on officiating basis vide order dated 2.3.1976 and subsequently he was declared quasi permanent w.e.f. 2.3.1979. While he was discharging his duty as Gram Sevak he was transferred from Phullen to Mamit, Mamit to Bilkhawthlir and Bilkhawthlir to Saiha during the years 1980 and 1981. Being aggrieved by his several transfer orders within a short period, before joining his duty at Saiha, he had approached the Director, Directorate of Agriculture, Government of Mizoram, Aizawl (respondent No. 3 herein) and requested him to cancel his transfer order to Saiha. The respondent No. 3 promised to cancel the transfer order to Saiha and asked him to stay at Aizawl awaiting the cancellation of the said transfer order and new posting order and on further instruction of the respondent No. 3 attended office at Aizawl for some time. Thereafter, when the petitioner attempted to draw his pay and salary for the month of July 1981 and onwards, he was informed that his pay was not prepared. Being disheartened he was reluctant to attend the office and ultimately he absented himself from duty till 2000. On 29.5.2000 the petitioner made a representation (Annexure-2 to the writ petition) to the Director of Agriculture, Government of Mizoram (respondent No. 3 herein) for allowing him to resume his duties and on consideration of the said representation the respondent No. 2, Secretary to the Government of Mizoram, Agriculture Department informed respondent No. 3 regarding the decision of the government for reinstatement of the petitioner to the post of Gram Sevak with retrospective effect from 1.7.1981 without any arrears of pay and allowances but only fixation of pay and pensionary benefits purely on humanitarian grounds. Thereafter, respondent No. 3 vide office order dated 10.9.2002 (Annexure 4 to the writ petition) reinstated the petitioner in service as Gram Sevak with retrospective effect without any arrears of pay and allowances but only for fixation of his pay and pensionary benefits purely on humanitarian grounds. In the said office order it was also mentioned that he would be paid pay and allowances as permissible under rules w.e.f. his date of joining, i.e., 26.8.2002. The petitioner being aggrieved submitted a representation on 29.8.2008 to the respondent No. 2 rue praying for payment of pay and allowances for the period from 1.7.1981 to 10.9.2002 and to treat the said period as on duty for all purposes in accordance with FR 54. The respondent No. 3 vide letter dated 20.3.2009 informed the decision of the government to the petitioner, inter alia, that the principle of "no work no pay" would be applied in his case. Hence, payment of pay and allowances for the period of 1.7.1981 to 10.9.2002 could not be considered. Being aggrieved by the aforesaid action of the respondent authority the petitioner preferred the instant writ petition.

4. The State respondents by way of filing a detailed affidavit-in-opposition denied

the allegations of the petitioner and contended therein that the petitioner was transferred to Saiha and released to join there on 26.8.1981, but he did not join in his place of posting. The respondents also denied the contention of the petitioner that the Director, respondent No. 3, had promised to the petitioner to cancel the transfer order to Saiha and asked him to stay at Aizawl awaiting the cancellation of transfer order and new posting order. It is further contended that the petitioner was supposed to draw his pay and allowances from the place of posting on transfer, i.e., Saiha but as he did not join there his pay bill could not be prepared at Saiha. The petitioner absented himself unauthorisedly for a long period from July 1981 till 26.8.2002, i.e., for almost about 20 years without giving any information to his employer, particularly to the authority under whom he was working at the relevant time. The authority after considering his representation dated 29.5.2000 and subsequent undertaking (Intiamkamna) executed by him on 22.8.2002, wherein he specifically stated that if he was reinstated by the government, as asked for, he would neither claim any arrear of pay and allowances, etc., for the period of his absence nor claim seniority but only prayed for taking into account the said period for his pensionary benefit and he also expressed his willingness to go for voluntary pension soon after his reinstatement, allowed him to resume his duties vide order dated 10.9.2002. Therefore, the petitioner has no right to approach this Court for quashing the impugned letter and office orders so far as relating to his pay and allowances for the period from 1.7.1981 to 10.9.2002, i.e., till his reinstatement in service. It is also contended by the respondents that FR 54 has no application in the instant case as the petitioner was never reinstated after dismissal or removal by the authority and also the order of reinstatement is not the result of an appeal or review of any statutory authority like disciplinary or appellate authority or any order of court. In the instant case the government reinstated the petitioner only on humanitarian ground after considering his representation and undertaking. It is further contended that under proviso to FR 17(1), a government servant who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence. Therefore, the petitioner who was absent from duty for more than 20 years, i.e., from 1.7.1981 to 10.9.2002 without any authority is not entitled to get any pay and allowances for the said period of unauthorized absence.

5. Mr. Lalramzauva, learned Counsel for the petitioner in support of the writ petition submits that when the authority reinstated the petitioner vide order dated 10.9.2002 (Annexure-4 to the writ petition) the authority is bound to pay him the pay and allowances for that period, i.e., from 1.7.1981 to 10.9.2002. He further contends that as the petitioner was absent from his duty from 1.7.1981 to 10.9.2002 and his pay and allowances were not prepared by the authority for that period and the authority also did not issue either any order of dismissal or removal, or even did not issue any order of suspension, the said period has to be considered as the period of removal and as he was subsequently reinstated in service, FR 54 is applicable in the instant case and the petitioner is entitled to get

all the benefit of FR 54(4). In support of his aforesaid contention he relied upon a decision of the Apex Court in the Union of India and Others Vs. Dinanath Shantaram Karekar and Others, particularly paragraph 9 of the said law report.

6. Per contra, Mrs. Azyu submits that it is a settled position of law that when an employee is absent from duty for a long period unauthorisedly the employer government has the right to dismiss the said employee even without any disciplinary proceeding. But in the instant case, as the government did not take any action regarding the unauthorized absence of the petitioner for about 20 years the petitioner made a representation with an undertaking and the government after consideration of the representation as well as the undertaking (Intiamkamna) wherein the petitioner specifically stated that he would neither claim any arrear of pay and allowances, etc., for the period of his absence nor he would claim any seniority but only prayed for taking into account his service for pensionary benefit, the government on humanitarian ground allowed him to join. Though while allowing the petitioner to join, in the order the authority used the word "reinstatement", in Annexure 4 to the writ petition, but the petitioner should not be allowed to take the benefit of the said word "reinstatement" as used by the authority. Unless a person is dismissed or removed or terminated, question of reinstatement does not arise. She also submitted that FR 54 has no application in the instant case as admittedly the petitioner was neither dismissed nor removed from service and also no disciplinary proceeding was initiated against him for such misconduct of unauthorized absence and no court has passed any order setting aside the order of dismissal or removal. She further submitted that the petitioner is estopped by his own promise made in the undertaking (Annexure 1A to the Affidavit-in-opposition). She finally submitted that when the petitioner himself admitted in his petition that he did not work for the period from 1.7.1981 to 10.9.2002 by his own volition he is not entitled to pay and allowances for that period applying the principle of "no work no pay".

7. In response to the submission of Mrs. Azyu, Mr. Lalramzauva, contended that there cannot be any estoppel against the law and when the petitioner is entitled to pay and allowances for the period of his absence from 1.7.1981 to 10.9.2002 due to the order of reinstatement, the same cannot be denied on the ground of estoppel. An undertaking, contrary to law, cannot be enforced. In support of his aforesaid contention he relied upon a decision of this Court in Santosh Boro and Others Vs. State of Meghalaya, .

8. Before addressing the submission of the learned Counsel for the parties, it would be proper for this Court to reproduce the English rendering of the undertaking of the petitioner dated 22.8.2002 written in Mizo language as witnessed by the Under Secretary to the Government of Mizoram, Agriculture Department and Superintendent of Horticulture, which is annexed to the affidavit-in-opposition as Annexure 1A and accordingly the same is reproduced hereunder:

UNDERTAKING

I, P. Malsawma had been working as Gram Sevak under Agriculture Department since date 2.3.1976. I was transferred three times during 1980 to 1981 and had not resumed my duty thereafter as I aggrieved due to this frequent transfer and posting. I had drew my pay and allowances up to the month of June 1981 under Agriculture Department. I do hereby undertake the following points if I am re-instated by the Government as applied for.

1. I shall neither claim any arrear of pay and allowances, etc., for the period of my absence nor claim seniority but shall take into account for my pensionary benefit.

2. I wish to go for voluntary pension soon after I am re-instated, the Government will take steps accordingly.

I will retire on voluntary pension when the Government is ready to release me.

Witnesses:

Sd/- P. MALSAWMA Ramhlun North

1. Sd/- THANLIRI PACHUAU Under Secretary to the Government of Mizoram, Agriculture Department

2. Sd/- SHYAM BAHADUR Superintendent Horticulture Department

9. It is also necessary to reproduce the impugned order dated 10th September, 2002 (Annexure-4 to the writ petition) by which the petitioner was allowed to join in his service as Gram Sevak by using the word "reinstated" with retrospective effect from 1.7.1981 without any arrears of pay and allowances. Hence, the same is reproduced hereunder:

NO. C.18013/5/2000-DTE(AGR) GOVERNMENT OF MIZORAM DIRECTORATE OF AGRICULTURE AND MINOR IRRIGATION MIZORAM: AIZWAL OFFICE ORDER Dated Aizawl, the 10th September, 2002

In pursuance of approval of Government of Mizoram conveyed vide No. A.21020/2/2000-AGR dated 26.8.2002, Shri P. Malsawma is allowed to resume his duly as G.S. and he is accordingly reinstated to the post of G.S. with retrospective effect from 1.7.1981 without any arrears of pay and allowances but only for fixation of his pay and pensionary benefits purely on humanitarian ground.

He will paid pay and allowances as admissible under Rules with effect from the date of joining, i.e., 26.8.2002 under the following Head of Accounts:

2401 - Crops Husbandry 001 - Direction and Amn. 001(02)3802 - Admn. (NP) 001(02)3802(01) - Salary for Estab.

He is posted in the Directorate of Agriculture and Minor Irrigation, Mizoram, Aizawl.

Sd/- Dr. O.P. SINGH Director of Agriculture and Minor Irrigation, Mizoram: Aizawl.

10. Having heard the learned Counsel for the parties and on going through the relevant records as available before this Court, it appears that admittedly the petitioner off himself from service unauthorisedly for about 20 years and the same was without any fault of the authority. Though a plea has been taken regarding the promise given by respondent No. 3 that the transfer order of the petitioner from Aizawl to Saiha would be cancelled and he was also asked to stay at Aizawl but the same has been denied by way of filing the affidavit-in-opposition and it is not controverted by the petitioner by filing any rejoinder affidavit. Therefore, it can be easily presumed that there was no promise on the part of the Director of Agriculture, respondent No. 3. More so, it is also the admitted position that during the period of absence of the petitioner no order of dismissal or removal has been issued by the authority, rather it is the petitioner who filed a representation on 29.05.2000 and thereafter he submitted an undertaking (Annexure 1A to the Affidavit-in-opposition) and the authority only after consideration of the representation and said undertaking submitted by the petitioner issued the office order dated 10th September, 2002, as stated supra, wherein it is stated that he is allowed to resume his duty as Gram Sevak with retrospective effect from 1.7.1981 without any arrear of pay and allowances but only for consideration of his pensionary benefit and the said office order dated 10th September, 2002 has been challenged by the petitioner after more than six years and during this period he did not raise any grievance till filing of his representation dated 29.8.2008 (Annexure 5 to the writ petition) which was disposed of by the impugned order dated 20.3.2009 (Annexure 6 to the writ petition). As the learned Counsel for the petitioner placed reliance on FR 54, it would be proper for this Court to examine the same and for ready reference the said provision is quoted hereunder:

FR 54. (1) When a Government servant who has been dismissed, removed or compulsorily retired is reinstated as a result of appeal or review or would have been so reinstated but for his retirement on superannuation while under suspension or not, the authority competent to order reinstatement shall consider and make a specific order -

(a) regarding the pay and allowances to be paid to the Government servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Where the authority competent to order reinstatement is of opinion that the government servant who had been dismissed, removed or compulsorily retired has been fully exonerated, the Government servant shall, subject to the provisions of Sub-rule (6), be paid the full pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the

case may be:

Provided that where such authority is of opinion that the termination of the proceedings instituted against the Government servant had been delayed due to reasons directly, attributable to the government servant It may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing, that the Government servant shall, subject to the provisions of Sub-rule (7), be paid for the period of such delay, only such amount (not being the whole) of such pay and allowances as it may determine.

(3) In a case falling under Sub-rule (2), the period of absence from duty including the period of suspension preceding dismissal, removal or compulsory retirement, as the case may be, shall be treated as a period spent on duty for all purposes.

(4) In cases other than those covered by Sub-rule (2) (including cases where the order of dismissal, removal or compulsory retirement from service is set aside by the appellate or reviewing authority solely on the ground of non-compliance with the requirements of Clause (1) or Clause (2) of Article 311 of the Constitution and no further inquiry is proposed to be held) the Government servant shall, subject to the provisions of Sub-Rules (5) and (7), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended prior to such dismissal, removal or compulsory retirement, as the case may be, as the competent authority may determine, after giving; notice to the government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(5) In a case falling under Sub-rule 4, the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall not be treated as a period spent on duty, unless the competent authority specifically directs that it shall be treated so for any specified purpose:

Provided that, if the government servant so desires, such authority may direct that the period of absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, shall be converted into leave of any kind due and admissible to the Government servant.

11. On plain reading of the provision of FR 54, it appears that the said provision is relating to an employee who is reinstated either after dismissal or removal or suspension as a result of an order in appeal or review either by statutory authority or by a court of law. It has no application in case of an employee

claiming for the pay and allowances for the period he remained absent unauthorisedly.

12. Here in this case it is the admitted position that the petitioner was neither dismissed nor removed or suspended from service at any time and he was not reinstated after dismissal or removal or suspension in view of an order in appeal or review either by a statutory authority or a court of law. Therefore, according to this Court, the said provision of FR 54 has no manner of application in the instant case and, hence, this Court is unable to accept the submission of Mr. Lalramzauva, rather according to this Court, the submission of Mrs. Azyu has some force.

13. Now, let me examine the law reports cited by the learned Counsel for the petitioner, whether those cases have any application in the instant case or not.

14. In *Dinanath Shantaram Karekar and Ors.* (supra) the respondent employee since deceased was removed from service by way of penalty and the said order of penalty was upheld by the departmental authority and the order of removal was challenged before the Central Administrative Tribunal (CAT) on the ground, inter alia, neither the charge sheet nor the show-cause notice were ever served upon the original respondent and, therefore, the entire proceedings are vitiated. The Tribunal has found that the charge sheet which was issued to him by registered post was returned with the postal endorsement "not found", while the show-cause notice was published straightaway in *Dainiki Sagtar, Navshakti*. And the order of the appellate authority was challenged before the Central Administrative Tribunal (CAT) Bombay and during the pendency of the proceeding the original respondent died and the tribunal found the service of the charge sheet and the show-cause notice on the respondent as insufficient and, therefore, the order dated 19.8.1985, by which he was removed from service, was set aside. Considering the aforesaid fact the Apex Court in paragraph 9 noted that,

Where the services are terminated, the status of the delinquent as a government servant comes to an end and nothing further remains to be done in the matter. But if the order is passed and merely kept in the file, it would not be treated to be an order terminating services nor shall the said order be deemed to have been communicated.

15. In the case of *Man Bahadur Chhetri and Ors.* (supra) question came up as to whether the authority has the power to issue a notice to an employee for retirement from service before reaching the normal age of superannuation. In para 9 of the said report the Division Bench of this Court discussed regarding undertaking dated 31.1.1995 signed by the respondent to the effect that on his promotion to the rank of Subedar Major, he had agreed to retire from service on completion of 4 years as Subedar Major, or on his attaining the age of 55 years of age, whichever was earlier, cannot come in the way of making his rightful claim or for enforcing his legal right to continue in service up to the age of 60

years of age for the simple reason that there can be no estoppel against statute and the statutory right conferred upon the respondent to retire from service at the age of 60 years in terms of the amended FR cannot be bartered away by him by signing an undertaking of the nature purportedly enforced by the appellant authorities. The Division Bench also took note of the case of Shri K. Ramadas Shenoy Vs. The Chief Officers, Town Municipal Council, Udipi and Others, wherein the Apex Court held that, an excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. There is no quarrel with the aforesaid proposition that has been laid down by the learned Division Bench of this Court. In that case the right of the respondent therein under the statute was tried to be taken away with the aid of his undertaking dated 31.01.1995 which is not permissible under law.

16. The Apex Court in a catena of decisions held that one additional or different fact can make a world of difference between conclusions in two different cases even when the same principle is applied to both cases. [See The Regional Manager and Another Vs. Pawan Kumar Dubey, , Padmasundara Rao and Others Vs. State of Tamil Nadu and Others,]. In The State of Orissa Vs. Sudhansu Sekhar Misra and Others, the Apex Court observed in paragraph 13, "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it." Further, the Apex Court in Ambica Quarry Works v. State of Gujarat and Ors., (1987) 1 SCC 213 noted that, "The ratio of any decision must be Understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it." In Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, the Apex Court again observed, "It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

Therefore, it can easily be said that the fact of Dinanath Shantaram Karekar and Ors. (supra) and Man Bahadur Chhetri and Ors. (supra) are totally different from the case in hand and the question that arose before the Apex Court was also different and as such the decisions of the Apex Court in the aforesaid two cases are not applicable in the instant case.

17. In the instant case admittedly the petitioner himself absented from duty for about 20 years and the authority in fact allowed him to rejoin in service on the basis of his written undertaking fully on humanitarian ground though the authority could have easily terminated or dismissed him from service after taking the recourse of law. And in the instant case, the petitioner admittedly submitted an undertaking as witnessed by the Under Secretary to the Government of Mizoram, Agriculture Department and Superintendent of Horticulture Department, Government of Mizoram but he did not state the said fact in the body of the writ petition rather suppressed the same to get the relief as sought for. A person is supposed to approach a court of law to get relief with clean hand.

The petitioner did not make any statement in his writ petition regarding the undertaking dated 22.8.2002. Further, the petitioner stated in paragraph 9 of the representation that undertaking dated 22.8.2002 is contrary to law and cannot be enforced. In the writ petition, nowhere he stated that the said undertaking was obtained forcibly from him by the authority. Therefore, on the said undertaking the authority has the right to act as the said undertaking is neither forcibly obtained nor contrary to the provision of any statute par to provisions of FR. As in the instant case provisions of FR 54 has no application, it cannot be said that the undertaking is contrary to the said provision. On that count also the petition is supposed to be dismissed and the petitioner is not entitled to get any relief. In the instant case, though the petitioner has himself given an undertaking to the authority, suppressed that fact in his writ petition. Though in the representation respect of the petitioner 29.8.2008 (Annexure-5 to the writ petition) he stated inter alia, that the undertaking obtained from him cannot be a bar to get the benefit of statutory right but fact remains that the petitioner neither annexed the said undertaking with the instant writ petitioner there is any whisper about the same in the writ petition as stated (supra) meaning thereby, the petitioner tried to suppress material facts to get the relief as sought for. It is the respondents who came up with that fact and it is also a settled position that if an application under Article 226 of the Constitution is filed by an applicant with a deliberate concealment of material facts and also to mislead the court, then the relief sought for in the application should be refused. More so, when the petitioner did not discharge his duties for about 20 years, according to this Court, he cannot claim the pay and allowances for that period applying the principle of "no work no pay" as well as the undertaking submitted by him. Using a wrong word by the authority in the impugned order (Annexure 4 to the writ petition) would not create any right in favour of the petitioner unless the petitioner is otherwise entitled the pay and allowances as prayed for under a statute. In this case the petitioner fails to show any statutory provisions or executive order in favour of him regarding his entitlement to the pay and allowances for the period he himself off from service except the provisions of FR 54 which does not help him in any way.

18. For the above facts and circumstances, this Court is of the considered opinion that the impugned letters and the order do not require any interference by this Court.

19. In the result, the writ petition is dismissed being devoid of merit. No order as to costs.