

(2009) 09 CHH CK 0032
In the Chhattisgarh High Court
Case No : Writ Appeal No. 45 of 2008

State of C.G. and Others

APPELLANT

Vs

Ramashankar Yadav

RESPONDENT

Date of Decision : 04-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 1
Madhya Pradesh Vishesh Sashastra Bal Niyam, 1973 — Rule 37, 38

Citation : (2010) 1 CGLJ 1

Hon'ble Judges : R.N. Chandrakar, J;Dhirendra Mishra, J

Bench : Full Bench

Advocate : Kishore Bhaduri, Additional A.G. for State, for the Appellant; Malay Kumar Bhaduri, for the Respondent

Final Decision : Dismissed

Judgement

Dhirendra Mishra, J.—This writ appeal is directed against the impugned of Annexure-A/1 dated 29th January, 2008 passed in Writ Petition No. 4543/2004 whereby the petition filed by the Respondent has been allowed in terms of the judgment and order dated 18-2-2000 passed in O.A. No. 1207/89 and the Appellants herein have been directed to consider reinstatement of the Respondent forthwith.

2. Hereinafter the parties shall be referred to as per their description before the writ court.

3. Briefly stated facts of the case are that the Petitioner is a dismissed constable from 22nd Battalion, Mana, Raipur. He was appointed as a constable on compassionate ground in place of his deceased father-in-law in the year 1996. He had worked as a constable continuously for a period of 3 years. He was dismissed from active service by order dated 24-2-2000 (Annexure-P/1) on the ground that he failed in basic training test despite he was allowed 2 opportunities, therefore, in compliance of the circular dated 8-5-96 he was removed from the services. The appeal preferred by the Petitioner was further

dismissed by the appellate authority vide order dated 30-12-2000 (Annexure-P/2). The petition before the Director General of Police was again dismissed vide order dated 8-7-2002 (Annexure-P/3). The action was challenged on the ground that the impugned order is contrary to the provisions of Madhya Pradesh Vishesh Sashatra Bal Niyam, 1973 (for short "the Rules, 1973"), the same was passed without giving any opportunity of hearing to the Petitioner and the same is contrary to the departmental circulars which provide that while initiating disciplinary action against employees of ST/SC/OBC categories, liberal consideration should be taken by the authorities.

4. The Respondents in their return have referred Rule 37 of the Rules, 1973 and submitted that if the recruit fails to attain the required proficiency and fails to pass the recruit test at the end of the extended period, he may be discharged by the Commandant. The Petitioner failed twice in the recruit test, therefore, the order passed by the Respondents is just and proper and in accordance with Rule 37 of the said rules.

5. Learned Single Judge has passed the impugned order and has allowed the petition by observing thus:

2. Learned Counsel appearing for the Petitioner submits that the identical question, as to whether failing twice in recruits test at the end of the training period entails the termination from service, as required under Rule 37 of the Rules, 1973. He further submits that Rules 37 and 38 of the Rules, 1973, which have been adapted by the State of Chhattisgarh, were considered by the Madhya Pradesh State Administrative Tribunal, Jabalpur in O. A. No. 1207/89 Mahendra Singh v. Commandant 11th Battalion and Ors. connected matters. Learned Tribunal vide order dated 18.2.2000, after having heard learned Counsel for the parties allowed the petition and directed the Respondents to reinstate the Petitioners, forthwith in service. The case of the present Petitioner is similar to that of those, who were Petitioners in O.A. No. 1207/89.

3. Learned Counsel appearing for the Respondents/State submits that the submissions made by learned Counsel appearing for the Petitioner are correct. This case is squarely covered by the judgment and order dated 18.2.2000, passed in the case of Mahendra Singh (supra) by the Tribunal.

6. Shri Kishore Bhaduri, learned Additional Advocate General for the State/Appellants submitted that the order impugned has been passed on the basis of concession given by counsel for the State that ratio of law laid down by the Madhya Pradesh State Administrative Tribunal (for short "the Tribunal") in O.A. No. 1207/89 Mahendra Singh v. Commandant 11th Battalion is squarely applicable in the facts of the present case. The order of the Tribunal has been filed by the Petitioner. From bare perusal of the aforesaid order, it would be evident that dismissed constable Mahendra Singh in the aforesaid case was appointed on 23-10-81 after his due selection and he was required to undergo training of 9 months. He faced the recruits test, but failed in attaining requisite

proficiency. He was posted at Asam in an active company instead of asking him to undergo for further training of 6 months as provided in the Rule 37 of the Rules, 1973. The second test, took place in the month of July/August 1987. Without giving him further teaching, coaching or training, he was suddenly asked to appear in the test. The Respondents did not discharge him after the second test and allowed him to continue till expiry of the notice period and terminated his services on 10-3-89. In these circumstances, it was held that provisions of Rule 37 of Rules, 1973 are not mandatory, but only discretionary. From the documents filed by the constable and not controverted by the department, it is evident that the Respondents have waived the conditions as provided under Rule 37 of the said Rules. However, in the instant case, the Petitioner failed in the recruits test for the second time within the specified period under Rule 37 and thereafter the Petitioner was immediately discharged from services. The concession given by counsel appearing for the State is based on improper and illegal interpretation of the order passed by the Tribunal and contrary to the stand of the State in its return.

7. Relying upon the judgment in the matter of Commandant, 11th Battalion, A.P. Special Police (IR), Cuddapah, Cuddapah District Vs. B. Shankar Naik, it was argued that successful completion of the training is an inbuilt requirement for continuance in the employment.

8. On the other hand, Shri Malay Kumar Bhaduri, learned Counsel appearing for the Respondent/Petitioner relying upon the order of this Court passed in the matter of Balkrishna Agarwal v. State of C.G. and Ors. 2007 (3) CGLJ 85 (DB) argued that any order passed as a consequence of concession given by learned Counsel for the parties cannot be faulted and no ground is available to the Respondents to show interference with the order passed by the learned Single Judge.

9. We have heard learned Counsel for the parties.

10. From perusal of the documents annexed with the petition, it is evident that the Petitioner was allowed 2 opportunities to clear the recruits test as per Rule 37 of the Rules, 1973. When he failed in second opportunity also on 21 -2-2000. he was removed from service vide order of Annexure-P/1 dated 24-2-2000. His appeal was subsequently dismissed by the Deputy Inspector General of S AF (Annexure-P/2) and his mercy petition was again dismissed by the Director General of Police vide Annexure-P/3. The impugned order has been passed solely on the assertion of learned Counsel for the Petitioner that Rules 3 7 and 3 8 of the Rules, 1973, which have been adapted by the State of Chhattisgarh, were considered by the Tribunal in O.A. No. 1207/89 and the Tribunal allowed the petition and directed the Respondents to reinstate the Petitioner forthwith in service. The case of the Petitioner is similar to that of those who were Petitioners in O. A. No. 1207/89. The above submission for the Petitioner was not controverted by learned Counsel for the State/ Respondents and it was contended that the case is squarely covered by the judgment and order passed

by the Tribunal in Mahendra Singh's case. From bare perusal of the order of the Tribunal, which has been annexed with the writ petition, it is evident that on the basis of conduct of the Respondents in not discharging the Petitioner after he failed in the second recruits test, it was held that the Respondents have waived the conditions as provided under Rule 37 of the said Rules, whereas, in the present case, the Petitioner was immediately discharged from service after he failed in recruits test for the second time. The concession given by learned Counsel appearing for the State is based on improper and illegal interpretation of the order passed by the Tribunal and contrary to the return of the State.

11. In the matter of B. Shankar Naik (supra), the Respondents were appointed as constables, One of the conditions stipulated in the order was that they should pass language test within a period of probation and in case of failure, they shall be discharged from services. Their services were discharged on the ground that they had failed to pass the prescribed test within the prescribed period of probation. Referring to various rules of A.P. Police Subordinate Service Rules, it was held that the appointment order requiring probationer to undertake training requirement obviously means successful completion of the training. On probationer's failing to pass training, he can be terminated from service for non-fulfillment of conditions of appointment.

12. In the instant case also, since the Petitioner failed to clear the above recruits test as per Rule 37 of the Rules, 1973, he was discharged from service.

13. In the matter of State of Maharashtra Vs. Ramdas Shrinivas Nayak and Another, , it has been held that a party may resile and an appellate court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

14. In the matter of P.K. Vasudeva Vs. Zenobia Bhanot, , it has been held thus:

The sequence of the events shows that the order of Single Judge of the High Court dated 1-5-1997 which was passed on the concession of the counsel for the Appellants was acted upon when the Rent Control Officer decided the matter after remand. The order dated 1-5-1997 which was passed by the High Court on agreement of the parties stood exhausted when the parties appeared before the Rent Controller and the Rent Controller decided the matter and thereafter there remained nothing to be challenged. If the Appellants wanted they could have promptly challenged the order dated 1-5-1997 passed by the High Court and obtained stay of the remand order. The Appellant having chosen not to do so, it is too late in the day to challenge the order dated 1-5-1997 passed by the High Court based on agreement of the parties. Once the counsel for the tenants conceded before the High Court that the revision petitions required remand, it is no longer open to the tenants to contend that the order dated 1-5-1997 passed by the High Court could not have been passed.

15. In the matter of B.S.N.L. and Others Vs. Subash Chandra Kanchan and Another, , it has been held that in terms of Order 3 Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. It has been further observed that the matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client.

16. In the matter of Ganpatbhai Mahijibhai Solanki v. State of Gujarat and Ors. (2008) 12 SCC 353, it has been held that any wrong concession made by the counsel would not be binding upon the State. It has been observed that it is also trite that the admission made contrary to law shall not be binding on the State.

17. In the instant case, as we have already observed in the foregoing paragraphs that the impugned order was passed keeping in view the order of the Tribunal passed in Mahendra Singh's case, on the basis of concession given by counsel representing the State that ratio of law propounded in the aforesaid judgment with respect to Rule 37 of the Rules, 1973 is squarely applicable to the present case, however, as already stated in the earlier part of our judgment that the Tribunal has held that the Respondents had waived the conditions as provided under Rule 37 of the said Rules on the basis of uncontroverted material available on record in that case and no such circumstances exist in the present case.

18. So far as reliance in the matter of Balkrishna Agarwal (supra) placed by the Respondent is concerned, it is true that the impugned order was passed by the Respondents on the basis of concession and the same cannot be faulted. However, taking into consideration the grounds raised by the Appellants in this appeal and also the fact that the concession made by learned Counsel for the State was contrary to the pleadings in the return filed by the State as also based on improper and illegal interpretation of the Tribunal's order, we hold that the Appellants have made out sufficient ground for our interference.

19. In the result, we allow this appeal and set aside the order dated 29th January, 2008 passed by the learned Single Judge in Writ Petition No. 4543/2004 and further dismiss the writ petition preferred by the Respondent.