

(2009) 10 KL CK 0115

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23232 of 2009 (Y)

Sudhakaran C.B.

APPELLANT

Vs

The Cochin Educational Society and Others

RESPONDENT

Date of Decision : 23-10-2009

Acts Referred:

Citation : (2009) 3 KLJ 682

Hon'ble Judges : T.R. Ramachandran Nair, J

Bench : Single Bench

Advocate : V. Chitambaresh, K. Amminikkutty and N. Raghuraj, for the Appellant; A. Jayasankar, Manu Govind and B. Meera, for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair

1. The entitlement of the petitioner for payment of salary and other allowances during the period in which he was out of service consequent on the disciplinary action initiated against him, is the question to be decided in this writ petition. The petitioner was the Head of the Department (English) in Cochin College. Disciplinary proceedings were initiated against him which resulted in issuance of Ext. P1 order by which, after accepting the enquiry report, the managing committee proposed to impose the punishment of compulsory retirement. The punishment was effected from 11-12-2004. The matter ultimately reached this Court in C.R.P. No. 1181/2005 which was disposed of by Ext.P3 Judgment. The order passed by the University Appellate Tribunal was set aside and this court held that the punishment of compulsory retirement imposed on the petitioner shall stand converted to one of voluntary retirement from the date of the judgment. Ext.P4 is the consequential order passed by the University Appellate Tribunal. Even though the petitioner approached the authorities of the college for payment of salary and other benefits, that was ultimately rejected by Ext.P9 communication which is under challenge in this writ petition.

2. Respondents 1 to 3 have filed a counter affidavit disputing the claim. It is the contention of respondents 1 to 3 that the petitioner was never exonerated from the charges and this court in Ext.P3 judgment, has not ordered payment of any back wages also. Merely because Exts. P1 and P2 are set aside, that will not enable him to claim back wages. Learned Govt. Pleader also opposed the claim of the petitioner.

3. Heard Shri V. Chitambaresh, learned Senior Counsel for the petitioner, Shri. A. Jayasankar, learned Standing Counsel for Cochin College and Shri. T.B. Remani, learned Govt. Pleader for the official respondents.

4. Shri. V. Chitambaresh, learned Senior Counsel for the petitioner contended that the entire disciplinary action was held as vitiated, by this Court going by the findings in para 14 of Ext. P3 judgment. It is therefore submitted that the disciplinary proceedings stands eschewed and therefore when the punishment itself has been obliterated, the petitioner is entitled for payment of entire back wages. It is submitted that the same is implied from the findings rendered by this court in the judgment.

5. A reading of Ext.P3 judgment shows that this Court found that furnishing a copy of the enquiry report before accepting the same by the employer and proposing a punishment is a mandatory requirement of the principles of natural justice. The decision of the Apex Court in Managing Director, ECIL, Hyderabad, Vs. Karunakar, etc. etc., was also relied on by the Division Bench. Accordingly, it was held that the same vitiates that disciplinary proceedings. The relief was woulded accordingly. It was found that the petitioner was due to attain the age of superannuation on 31-3-2009 and as there will be hardly two months left for the management to complete the further disciplinary proceedings, if any notionally reinstating him in service, and ultimately by the time an order is to be passed, he would have attained the age of superannuation and then no question of punishment of compulsory retirement would become possible. It was held in para 16 thus:

Considering the fact that the petitioner had unblemished record of service except the present disciplinary action and further considering the fact that his academic brilliance is beyond any dispute and also that he is due to retire from service on 31-3-2009, we think it will be in the interest of justice, to accept his request to convert compulsory retirement to that of voluntary retirement from today, and we do so.

It is true that the judgment Ext.P3 did not order payment of back wages to the petitioner. Therefore, the question is as to what will be impact on the conversion of the punishment of compulsory retirement into voluntary retirement. It is clear that the punishment as proposed has been interfered with. Therefore, it cannot be taken that the petitioner has been inflicted with any punishment. Voluntary retirement ordered by this Court from the date of judgment cannot therefore be understood as a punishment at all, even though learned counsel for respondents

1 to 3 vehemently argued that it amounts to a punishment itself.

6. Then the question is whether the petitioner is entitled for payment of full back wages which represents the salary and other allowances. The entitlement for getting full back wages on reinstatement in service depends upon various circumstances. There is a change in the trend in the light of the principles laid down by the Apex Court in the recent decisions. The principles usually adopted that, an employee who is reinstated in service is entitled to get entire back wages, has been explained as not a universal principle.

7. In U.P. State Brassware Corpn. Ltd. and Another Vs. Udai Narain Pandey, , the said issue was examined in detail. It was held thus in para 42:

A person is not entitled to get something only because it would be lawful to do so. If that principle is applied, the functions of an Industrial Court shall lose much of their significance.

It was also held in paragraph 17 and 43 thus:

Although direction to pay full back wages on a declaration that the order of termination was invalid used to be the usual result, but now, with the passage of time, a pragmatic view of the matter is being taken by the court ret lising that an industry may not be compelled to pay to the workman for the period during which he apparently contributed little or nothing at all to it and/or for a period that was spent unproductively as a result whereof the employer would be compelled to go back to a situation which prevailed many years ago, namely, when the workman was retrenched. The changes brought about by the subsequent decisions of the Supreme Court, probably having regard to the changes in the policy decisions of the Government in the wake of prevailing market economy, globalisation, privatisation and outsourcing, is evident.

Finally in Para 45 it was found that payment of full back waged therefore cannot be the natural consequences.

8. The very same issue has been considered in detail in two recent decisions of the Apex Court in Metropolitan Transport Corporation v. Venkatesan (2009 (11) SCA 50) and C.N. Malla v. State of J & K and others (2009 AIR SCW 5459). In Metropolitan Transport Corporation's case (Supra), after examining the various decisions of the Apex Court, it was held thus in para 11:

First, it may be noticed that in seventeen and eighties, direction for reinstatement and payment of full back wages on dismissal order having been found invalid would ordinarily follow as a matter of course. But there is change in legal approach now. We recently observed in Jagbir Singh Vs. Haryana State Agriculture Marketing Board and Another, that in recent past there has been a shift in the legal position and in a long line of cases, this court has consistently taken the view that the relief of reinstatement with back-wages in not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is held to be in contravention to the prescribed

procedure.

The above decision was relied upon in C.N. Malla's case (2009 AIR SCW 5459) and after examining the various decisions, it was held thus in para 12:

The legal position is fairly settled by catena of decisions that direction to pay back wages in its entirety is not automatic consequent upon declaration of dismissal order bad in law. The concept of discretion is inbuilt in such exercise. The court is required to exercise discretion reasonably and judiciously keeping in view the facts and circumstances of the case. Each case, of course, would depend on its own facts.

It was a case where the full back wages were awarded by the learned Single Judge which was reversed by the Division Bench. The Apex Court, after analysing various facts, ordered 50% of the back wages from the date of filing of the writ petition until he attains the age of superannuation. Therefore, the payment of full back wages cannot be said to be automatic.

9. Once the punishment is set aside, the disciplinary authority will have to decide as to how the period during which the officer remained outside from the date of its imposition till it is set aside, has to be treated. Herein, going by Ext.P9, the management was of the view that the petitioner is not entitled for any salary and allowances for the period in question. Therefore, it is clear that they have treated that he is not eligible for any such benefits, in the light of Ext.P3 judgment. This court in Ext.P3, has set aside the punishment, evidently. Therefore, as far as the petitioner is concerned, the disciplinary proceedings did not affect his career for the disputed period. He was allowed to voluntarily retire from service from the date of judgment. Hence, the period of service from 11-12-2004 to 20-01-2009 cannot be eschewed from the total length of service of the petitioner for the purpose of granting various benefits including retirement benefits. Then the question is whether he is entitled only for a notional fixation of the benefits during the said period. Naturally, this court will have to assess various factors in arriving at the correct formula. The claim for payment of entire back wages for the period from 11-12-2004 to 20-01-2009 cannot also be justified in the light of the principles restated by the Apex Court in the various decisions. In that view of the matter, payment of 50% of the back wages for the period from 11-12-2004 to 20-01-2009 to the petitioner will be adequate. But the said period will be counted for the purpose of pension and other benefits. The salary and allowances as on the date of retirement will be fixed and the pensionary benefits will be calculated accordingly, by reckoning the above period as service rendered by him. Appropriate orders shall be passed within a period of one month from the date of receipt of a copy of this judgment and based on the same, consequential monetary benefits shall be disbursed within a further period of three months thereafter.

The writ petition is allowed as above. No costs.