

(2009) 11 CHH CK 0024

In the Chhattisgarh High Court

Case No : Writ Petition No. 4410 of 1991

Surendra Kumar Sharma (Dead) through L.Rs. Chanda
Sharma and Others

APPELLANT

Vs

The Food Corporation of India and Others

RESPONDENT

Date of Decision : 23-11-2009

Acts Referred:

Constitution of India, 1950 — Article 309, 311
Food Corporation of India Staff Regulations, 1971 — Regulation 19, 32A, 37A(7), 54,
58
Food Corporations Act, 1964 — Section 45
Specific Relief Act, 1963 — Section 14

Citation : (2010) 3 MPJR 112

Hon'ble Judges : Satish K. Agnihotri, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Satish K. Agnihotri, J.—Challenge in this petition is to the order dated 14th January, 1985 whereby the respondent-Corporation has struck off the name of the petitioner from the rolls w.e.f. 25th July, 1984, and the order dated 15th October, 1990 (Annexure P/9) whereby the representation filed by the petitioner for reinstatement in service, has been rejected.

2. The indisputable facts, in brief, as projected by the petitioner are that the petitioner was working as Assistant Grade III (Depot) at Mandir Hasaud, with the Food Corporation of India, in the year 1985. The petitioner left the office on 25th July, 1984 and thereafter joined the duties on 18th August, 1984 with an application for leave. According to the petitioner, the petitioner continued in his duty upto 15th October, 1984 and thereafter, he fell seriously ill with Typhoid and remained on leave upto 06th February, 1985. On the ground that the petitioner remained absent without prior permission of the authorities, a notice was published on 21st November, 1984 in the leading newspapers intimating the petitioner to join the service within a period of 15 days. Despite the publication

of the said notice, the petitioner did not resume the duty within a period of 15 days. Thereafter, the impugned order dated 14th January, 1985 was passed striking off the name of the petitioner from the rolls of the respondent-Corporation stating that the petitioner has abandoned the service of the respondent-Corporation on his own and as such, his name had been struck off from the rolls of the Corporation w.e.f. the dates indicated in column No. 4 i.e. 25th July, 1984. Thereafter, the petitioner preferred a representation to the Senior Regional Manager on 12th February, 1985 (Annexure P/2) which was dismissed on 15th October, 1990 (Annexure P/9), which is also impugned herein.

3. Shri Anil K. Pandey, learned counsel appearing for the petitioner would submit that the notice was published in the newspapers at Bhopal and not at Raipur and as such, the petitioner was not aware of the notice published by the respondents. Further, his place of posting was wrongly shown as District Office, Kapa when he was actually posted at Storage, Mandir Hasaud. The petitioner was on medical leave upto 6th February, 1985 and as such, the petitioner could not have been treated as absent w.e.f. 25th July, 1984. Thus, the impugned order dated 14th January, 1985 is contrary to the provisions of the Food Corporation of India (Staff) Regulations, 1971 (for short "the Regulations, 1971"), as no charge sheet was framed and no opportunity of hearing was afforded to the petitioner to put forward his case. Thus, the impugned termination order deserves to be quashed on the ground of violation of statutory provisions of Regulations, 1971 of the Food Corporation of India.

4. Per contra, Shri B.P. Gupta, learned counsel appearing for the respondents would submit that the petitioner remained absent from duty without prior permission of the competent authority from 25th July, 1984 to 17th August, 1984 as there was no leave available either in the account of the petitioner against earned leave or half pay leave. The petitioner applied for leave (Annexure R/2) for the first time before the Assistant Manager, FCI, Mandir Hasaud on 22nd August, 1984 with a joining report dated 18th August, 1984 (Annexure R/3). The said application was forwarded to the senior officer for sanction of the leave. The same was not sanctioned by the District Manager, Kapa as no leave was due to the petitioner. Shri Gupta would further submit that the petitioner surreptitiously put his signature in the attendance register on 18th August, 1984, 21st August, 1984 and 22nd August, 1984. Thereafter, the petitioner remained absent and managed to put his signatures without attending the duties in the attendance register on 3rd, 7th, 8th, 9th, 11th, 12th and 15th October, 1984. After having come to know about the fraud played by the petitioner, the Assistant Manager, scored out the same with his initials. In fact, the petitioner attended the duties on 13th October, 1984 only and thereafter, again remained absent from 15th October, 1984 onwards. A notice was published in the newspapers viz. "Navbharat" and "M.P. Chronicle" in Bhopal and in Raipur edition, having a wide circulation on 21st November, 1984 (Annexure R/7) calling upon the petitioner alongwith other similarly situated employees to resume the duties within a period of 15 days, and in default, the impugned removal order

dated 14th January, 1985 (Annexure R/10) was passed in accordance with the circular dated 25th December, 1981 (Annexure R/9). Shri Gupta would further submit that since this was a case of abandonment of service, no other notice or framing of charge-sheet was necessary. The petitioner was rightly removed on account of abandonment of service.

5. I have heard learned counsel appearing for the parties, perused the pleadings and documents appended thereto.

6. During pendency of the writ petition, the petitioner died on 14th June, 1994 leaving behind his wife, two daughters and one son as legal heirs. They have been impleaded as legal heirs vide order dated 20th September, 1994. Thereafter, one of the legal representative i.e. the son of the petitioner namely Shailendra Kumar Sharma also died on 10th September, 2000, leaving behind his wife. The wife of son, Shailendra Kumar, alongwith other three daughters of the petitioner who could not be brought on record earlier, were ordered to be brought on record vide order dated 8th August, 2005.

7. From perusal of the documents, it appears that the petitioner remained absent from duties without permission of the competent authority from 25th July, 1984 onwards till the removal order was passed on 14th January, 1985. The petitioner did not respond to the notice published in the news papers which had wide circulation in Bhopal and in Raipur. Contention of the petitioner that the place of posting has wrongly been mentioned at Kapa, is not factually correct as he was posted at Mandir Hasaud which comes within the District Office of the Corporation at Kapa.

8. Striking off the name from the rolls of the respondent-Corporation amounts to removal from service as admittedly, the petitioner was a regular and permanent employee of the respondent-Corporation.

9. The Regulations, 1971 were framed in exercise of powers conferred by Section 45 of the Food Corporations Act, 1964 (97 of 1964). Section 5 of the Regulations, 1971 deals with discipline and appeal regulations. Regulation 54 of the Regulations, 1971 provides for imposition of penalties. There is no provision for removal from service on account of absence under major penalties. Regulation 54 of the Regulations, 1971 reads as under:

54. Penalties.

Notwithstanding anything contained in any other regulation, and without prejudice to such action to which an employee may become liable under any other regulation or law for the time being in force, the following penalties may (for good and sufficient reasons and as hereafter provided) be imposed on any employee of the Corporation.

Minor penalties:

(i) Censure;

(ii) Withholding of his promotion;

(iii) Recovery from his pay of the whole or part of any pecuniary loss caused by him to the Corporation by negligence or breach of orders;

(iv) Withholding of increments of pay.

Major penalties:

(v) reduction to a lower stage in the time-scale of pay for a specified period, with further directions as to Whether or not the employee of the Corporation will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(vi) reduction to a lower time-scale of post which shall ordinarily be a bar to the promotion of the employee to the time-scale of pay or post from which he was reduced, with or Without further directions regarding conditions of restoration to the post from which the employee of the Corporation was reduced and his seniority and pay on such restoration to that post;

(vii) Compulsory retirement;

(viii) Removal from service which shall not be a disqualification for future employment under the Corporation;

(ix) Dismissal from service which shall ordinarily be a disqualification for future employment under the Corporation.

Explanation: The following shall not constitute a penalty within the meaning of this regulation;

(a) discharge of an employee for failure to pass any examination or test or a medical test prescribed for fresh appointment to any category of post;

(b) compulsory retirement of an employee in accordance with the provision relating to superannuation or retirement;

(c) termination of service or reversion to a lower category or post of an employee appointed or promoted as no probation either during or at the end of the period of probation;

(d) discharge of an employee under regulation 19 or as a measure of retrenchment for want of vacancy;

(e) termination of service of an employee employed under a contract or agreement in accordance with the terms of such contract or agreement or in the case of an employee appointed for a specific period, at the end of such period;

(f) reversion of an employee promoted from a lower post to a higher post, to such lower post for want of vacancy;

(g) non-promotion of an employee after consideration of his case for promotion whether on a regular or on ad-hoc basis to a post to which he is eligible for being considered;

(h) replacement of the services of an employee whose services had been borrowed at the disposal of his parent organisation.

10. Regulation 58 of the Regulations, 1971 deals with procedure for imposing major penalties that no order imposing any of the penalties as specified in clauses (v) to (ix) of Regulation 54, shall be made except after an enquiry held as far as may be, in the manner provided in this regulation and Regulation 59, or in the manner provided by the Public Servants (Inquiries) Act, 1850 (37 of 1850). It also provides steps for holding enquiry. Firstly, the disciplinary authority shall draw or cause to be drawn the substance of the imputation of misconduct or misbehavior into definite and distinct articles of charge and thereafter, the show cause notice to be issued to the delinquent employee and after following the detailed procedure, the order for imposition of major penalty, may be passed.

11. Regulation 32A of the Regulations, 1971, deals with the term "misconduct". Sub clause (7) of Regulation 32A provides that "absence without leave or overstaying the sanctioned leave for more than four consecutive days without sufficient grounds on proper or satisfactory explanation".

12. In the present case, it is a case of the petitioner that he remained absent on account of serious illness, and without affording opportunity of hearing, the order of removal by striking off his name from the rolls of the Corporation, was passed. Admittedly, the respondent-authorities have not taken recourse to the statutory procedure as prescribed in Regulation 58 of the Regulations, 1971 before imposition of major penalty of removal from service. The absence from the duty can at the most, come within the purview of misconduct as defined under regulation 37A (7) of the Regulations, 1971. If there is a charge of misconduct, that has to be proved in accordance with the provisions as prescribed in Regulation 58 of the Regulations, 1971.

13. The executive circular dated 25th December, 1981 (Annexure R/9), provides that if an employee remains away from his duty/office for long period, his name may be struck off from the rolls of the Corporation. However, clause 5 of the said circular provides that wherever found necessary by the circumstances of a case, disciplinary action against the employee should be initiated immediately for willfully refusing to obey the order of the Controlling Authority within the purview of staff Regulations. In such cases, if the charges are proved against the employee, major penalties including removal/dismissal or compulsory retirement from service would appear to be merited.

14. Remaining absent from duty/office comes within the purview of "misconduct" as defined in Regulation 32A (7) of the Regulation, 1971, the respondent-authorities ought to have taken recourse to statutory procedure prescribed in Regulation 58 of the Regulations, 1971. After framing of charges, the same

should have been sent to the postal address of the petitioner, recorded in the office register, alongwith show-cause-notice. Nothing was done in this case. Even otherwise, the executive circular dated 25th December, 1981 (Annexure R/9) cannot override or over-rule the statutory rules and regulations.

15. A Constitution Bench, in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, observed as under:

33. There is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A regulation framed under statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Industrial Finance Corporation are all required by the statute to frame regulation inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees, these regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal section of declaration by courts to invalidate actions in violation of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employees a statutory status and impose restriction on the employer and employee with no option to vary the conditions. An ordinary individual in a case of master and servant contractual relationship enforces breach of contractual terms. The remedy in such contractual relationship of master and servant is damages because personal service is not capable of enforcement. In cases of statutory bodies, there is no personal element whatsoever because of the impersonal character of statutory bodies. In the case of statutory bodies it has been said that the element of public employment or service and the support of statute require observance of rules and regulations. Failure to observe requirements by statutory bodies is enforced by courts by declaring dismissal in violation of rules and regulations to be void. This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and compliance with rules and regulations imposed by statute.

16. The above ratio laid down by the Constitution Bench was referred approvingly by the Supreme Court, in Union of India (UOI) and Another Vs. Shardinu, observing as under:

16.....If there was any provision that for his previous misconduct his tenure could be cut short, then it is understandable that the Central Government could have exercised their powers. But in absence of such provision can a statutory appointment be cut short, especially when the incumbent has not incurred any disqualifications under the Act. It may appear to be embarrassing but

nonetheless we cannot ignore the statutory provisions. If the provisions of disqualification and removal were not there perhaps something could be done but in face of clear provisions bearing on the subject it will be a travesty of justice to cut short the statutory appointment of an incumbent.

20.....In this connection, our attention was invited to a decision of this Court in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi* wherein the Constitution Bench held that the termination of service of an incumbent by the Corporation created by statute without complying with the regulations framed by the Corporation cannot be made. The reason was that the termination contravened the provisions contained in the regulations. In short, when the appointment is made, the service conditions are laid down. The termination of such appointment could only be made in the manner provided in the statute and by no other way. Once the regulations have been framed and detailed procedure laid down therein, then in that case if the services of an incumbent are required to be terminated then that can only be done in the manner provided and none else. Similar view has been taken in *State of Kerala v. Mathai Verghese*.

17. In *State Bank of India and Others Vs. S.N. Goyal*, the Supreme Court observed as under:

17. Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable, having regard to the bar contained in Section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. The three well-recognised exceptions to this rule are:

(i) where a civil servant is removed from service in contravention of the provisions of Article 311 of the Constitution of India (or any law made under Article 309);

(ii) where a workman having the protection of the Industrial Disputes Act, 1947 is wrongly terminated from service; and (iii) where an employee of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules.

There is thus a clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief-damages or reinstatement with consequential reliefs- is whether the employment is governed purely by contract or by a statute or statutory rules. Even where the employer is a statutory body, where the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable. Conversely, where the employer is a non-statutory body, but the employment is

governed by a statute or statutory rules, a declaration that the termination is null and void and that the employee should be reinstated can be granted by courts. (Vide S.B. Dutt (Dr.) v. University of Delhi. U.P. Warehousing Corpn. V. Chandra Kiran Tyagi, Sirsi Municipality v. Cecelia Kom Francis Tellis, Vaish Degree College v. Lakshmi Narain, J. Tiwari v. Jwala Devi Vidya Mandir and Dipak Kumar Biswas v. Director of Public Instruction.).

18. Applying the well-settled rational laid down by the Supreme Court to the facts of the case on hand wherein, admittedly, the petitioner was removed from service without holding proper enquiry as envisaged in Regulation 58 of the Regulations, 1971, the question arises asto whether the petitioner is entitled to full back-wages with consequential benefits, the Supreme Court, in Gujarat Steel Tubes Ltd. and Others Vs. Gujarat Steel Tubes Mazdoor Sabha and Others, observed as under:

150. Another facet of the relief turns on the demand for full back wages. Certainly, the norma rule, on reinstatement, is full back wages since the order of termination is non est.

19. In the case on hand, as the order of removal is non est being contrary to the statutory provisions of Regulations, 1971, the petitioner is entitled to back-wages and consequent reliefs. However, since the petitioner has died during pendency of this petition, the petitioner may not be reinstated in service. Even otherwise, the petitioner would have retired from service on attaining the age of superannuation, hence the legal representatives of the petitioner are entitled to full back-wages from the date the petitioner was removed from service, till he would have retired from service on attaining the age of superannuation, with other consequential benefits.

20. Accordingly, the respondents are directed to pay the back wages from the date the impugned order of removal was passed till the date the petitioner would have retired from service on attaining the age of superannuation, with all consequential benefits, within a period of 12 weeks from the date of receipt of a copy of this order.

21. The petition is allowed to the above extent. No order asto costs.