

(2012) 10 AP CK 0076

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10710 of 2008

The Divisional Manager, South Central Railway, Hyderabad
Division, Secunderabad., and 2 others

APPELLANT

Vs

P. Bhaskar Rao

RESPONDENT

Date of Decision : 30-10-2012

Acts Referred:

Constitution of India, 1950 — Article 309

Railway Property (Unlawful Possession) Act, 1966 — Section 3(a), 3(ix)

Citation : (2013) 1 ALD 309 : (2013) 1 ALT 197 : (2013) LabIC 317

Hon'ble Judges : G. Rohini, J;C. Praveen Kumar, J

Bench : Division Bench

Advocate : Bhaskar Polluri, for the Appellant; Shiva, for the Respondent

Judgement

1. These three writ petitions being interlinked and based on the same set of facts are heard together and decided by this common order. South Central Railway is the petitioner in all the writ petitions which are filed aggrieved by the orders passed by the Central Administrative Tribunal, Hyderabad Bench in O.A. No. 596 of 2000, dated 12.09.2007; Review Application No. 26 of 2007, dated 17.12.2007; and O.A. No. 246 of 2010, dated 30.03.2012 respectively.

2. The facts, in brief, are as under:

The respondent in all the writ petitions by name P. Bhaskar Rao was serving as a Special "A" Grade Guard in South Central Railway, Vijayawada Division. While performing his duty as Guard in Konark Express on 6/9-7-1984 a theft of consignment loaded in the brake van of the said train had taken place with regard to which a complaint was lodged by the aggrieved party at the destination station i.e., Bhubaneswar. After due enquiry, C.C. No. 95 of 1985 was filed by the Railway Protection Force (RPF) before the VI-Metropolitan Magistrate for Railways, Visakhapatnam u/s 3 (ix) of the Railway Property (Unlawful Possession) Act. Again on 24.4.1985 while the respondent was working as Guard on Jayanthi Janatha Express, another theft took place from the brake van of the

said train and on the information extracted from the thieves who were caught with the stolen material by the RPF, the respondent herein was apprehended at Vijayawada station. He was produced before the VII-Metropolitan Magistrate for Railways, Vijayawada and after being charged with an offence u/s 3(a) of the Railway Property (Unlawful Possession) Act, he was remanded to judicial custody on 25.4.1985. The respondent was in the custody for a period of 7 days from 24.5.1985 to 1.5.1985 and C.C. No. 135 of 1986 was filed by the RPF in the Court of the VII-Metropolitan Magistrate for Railways, Vijayawada.

3. In view of the detention of the respondent in the custody for a period of more than 48 hours by order dated 16.5.1985 the respondent herein was placed under suspension w.e.f. 24.4.1985. However, O.A. No. 156 of 1987 filed by the respondent before the Central Administrative Tribunal, Hyderabad Bench was allowed by order dated 7.4.1988 and the order of suspension dated 16.5.1985 was revoked. Pursuant thereto, the respondent had reported to duty on 19.5.1988. However, according to the writ petitioners from the very next day i.e., 20.5.1988 he remained absent unauthorizedly and never reported for duty.

4. While so on 3.8.1991 the respondent was again detained in custody for a period exceeding 48 hours in Criminal Case No. 95 of 1985. On the said ground, the order dated 8.6.1992 came to be passed by the South Central Railway in terms of Rule 5 (2) of the Railway Servants (Discipline and Appeal) Rules, 1968 placing him under deemed suspension with effect from the date of detention i.e., 3.8.1991.

5. Subsequently, by order dated 15.9.1992 the respondent herein was convicted in C.C. No. 95 of 1985 and sentenced to one month rigorous imprisonment. In pursuance thereof, a show-cause notice dated 6/10-11-1992 was issued calling upon the respondent herein to show-cause as to why he should not be removed from service. As the respondent herein failed to submit his explanation by order dated 7.5.1993 the disciplinary authority imposed the penalty of removal from service with immediate effect in exercise of the powers conferred under Rule 14 (i) of the Railway Servants (Discipline and Appeal) Rules, 1968.

6. However, Criminal Appeal No. 113 of 1992 preferred before the Sessions Court, Rajahmundry by the respondent herein against the conviction in C.C. No. 95 of 1985 was allowed by judgment dated 9.12.1994 and the conviction was set aside. In pursuance thereof, the respondent herein filed O.A. No. 596 of 2000 before the Central Administrative Tribunal, Hyderabad Bench contending that in view of the acquittal by the Appellate Court he is entitled to be reinstated. Accordingly, he sought for a direction to reinstate him into service and also for payment of subsistence allowance from 3.8.1991 with effect from which date he was placed under suspension.

7. During the pendency of O.A. No. 596 of 2000, the other Criminal case registered against the respondent i.e., C.C. No. 135 of 1986 was disposed of and by judgment dated 7.11.1994 the respondent was convicted and sentenced to

rigorous imprisonment for two years with a fine of Rs. 2,000/-. Though the respondent preferred Criminal Appeal No. 80 of 1994 against the said order of conviction, the Court of Sessions, Metropolitan Division, Vijayawada by order dated 4.3.1999 confirmed the conviction, however modified the sentence by converting the imprisonment to further fine of Rs. 1,000/-. The respondent herein filed Crl. R.C. No. 1299 of 1999 before this Court and by order dated 11.4.2000 this Court had further reduced the fine of Rs. 500/-. Thus the conviction in C.C. No. 135 of 1986 has become final.

8. Having taken note of the fact that the conviction in C.C. No. 135 of 1986 has become final, O.A. No. 596 of 2000 was disposed of by the Tribunal by order dated 27.3.2002 with a direction to the Railways to pay the subsistence allowance as per his entitlement. It was recorded by the Tribunal that the respondent (applicant therein) did not press for the relief of reinstatement in view of the order passed by this Court in Crl. R.C. No. 1299 of 1999.

9. The respondent himself filed W.P. No. 44 of 2003 before this Court against the order in O.A. No. 596 of 2000, dated 27.3.2002 contending that termination of the services of an employee on the ground of conviction in a criminal case was not automatic. This Court by order dated 22.12.2006 disposed of W.P. No. 44 of 2003 setting aside the order dated 27.3.2002 and remanding the matter to the Tribunal for disposal afresh after considering the grounds that were raised in the writ petition. On remand, a fresh order came to be passed by the Tribunal on 12.9.2007 directing the writ petitioners to pay the subsistence allowance due to the respondent in accordance with the Rules from the date of the suspension/deemed suspension till the date of Tribunal's order i.e., 12.9.2007. However, the respondent filed a Review petition being Review Application No. 26 of 2007 pleading that it was erroneously recorded by the Tribunal that Crl. R.C. No. 1299 of 1999 was pending before this Court, whereas the said Revision Petition was already disposed of by this Court on 11.04.2000. The Tribunal disposed of the review application by order dated 17.12.2007 with a direction to revoke the suspension within eight weeks from the date of receipt of the said order. Being aggrieved by the same, the writ petitioners filed W.P. No. 10710 of 2008 against the order dated 12.9.2007 in O.A. No. 596 of 2000 and W.P. No. 12355 of 2008 against the order dated 17.12.2007 in Review Application No. 26 of 2007.

10. During the pendency of the said writ petitions, the writ petitioners issued a show-cause notice dated 27.8.2008 proposing to impose the punishment of removal from the date of conviction of the respondent in C.C. No. 135 of 1986 i.e., 7.11.1994 and accordingly calling upon him to submit his explanation in terms of Rule 14 (i) of the Railway Servants (Discipline & Appeal) Rules, 1968 as to why he should not be removed from service w.e.f. 7.11.1994. The respondent herein submitted a detailed explanation dated 8.9.2008 and after considering the same fresh order of removal was passed on 31.10.2008 imposing the punishment of removal from service w.e.f. 7.11.1994. As against the said order, the respondent herein preferred an appeal before the Divisional Railway Manager,

Hyderabad Division, South Central Railway. The said appeal was rejected by order dated 27.11.2009 as barred by limitation and therefore declining to go into merits of the case and rejected the appeal by order dated 27.11.2009. Aggrieved by the same, the applicant preferred O.A. No. 246 of 2010. The Tribunal below though did not express any opinion as to the correctness of the rejection of the appeal on the ground of delay, went into merits of the case and held that the removal with retrospective effect from 7.11.1994 was not contemplated under Rule 9 of the Railway Servants (Discipline & Appeal) Rules, 1968. Accordingly, the order of removal dated 31.10.2008 was modified by deleting the words "with effect from 7.11.1994" and making it clear that the order of removal would be effective from 31.10.2008. The writ petitioners herein were accordingly directed to make consequential payments to the applicant within a period of three months from the date of receipt of the said order. The said order dated 30.03.2012 passed by the Tribunal in O.A. No. 246 of 2010 is assailed in W.P. No. 20590 of 2012 filed by the South Central Railway.

11. We have heard Sri P. Bhaskar, the learned counsel appearing for the writ petitioners and Sri Shiva, the learned counsel appearing for the respondent and perused the material available on record.

12. The learned counsel for the writ petitioners vehemently contended that since the respondent had already been removed once w.e.f. 7.5.1993 consequent upon his conviction on 7.11.1994 in C.C. No. 135 of 1986, there is no need for any further order of removal. It is further contended that even assuming that the earlier order of removal was nonest, the subsequent order of removal with effect from the date of conviction in C.C. No. 135 of 1986 i.e., 7.11.1994 was rightly passed and that the Tribunal below committed an error in holding that there cannot be any removal from retrospective operation. So far as the first order of removal dated 7.5.1993 is concerned, the learned counsel further contended that since the respondent had remained unauthorisedly absent from 20.05.1988 onwards the direction of the Tribunal for payment of subsistence allowance for the entire period right from the date of deemed suspension was contrary to law. In support of his submissions, the learned counsel has relied upon *Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma*,

13. On the other hand, Sri Shiva, the learned counsel for the respondent contended that the penalty of removal under no circumstances can be imposed with retrospective effect and as rightly held by the Tribunal below it can be only from the date of issuing the said order. The learned counsel has relied upon *R. Jeevaratnam Vs. The State of Madras*, in support of his submission that the removal order cannot be with retrospective effect.

14. In the light of the rival submissions, the following points arise for consideration:

(1) Whether the order of removal dated 7.5.1993 is liable to be declared as nonest on the ground that it was never served on the respondent.

(2) Whether the subsequent order of removal dated 31.10.2008 imposing the punishment of removal from service w.e.f. 7.11.1994 is sustainable under law.

Point No. 1:

Admittedly this is a case where two criminal cases namely C.C. No. 95/1985 and C.C. No. 135/1986 were registered against the respondent on the allegations of theft of consignment loaded in the brake van on 6/9-7-1984 and again on 24.04.1985.

15. Initially the respondent was placed under suspension by order dated 16.5.1985 on the ground that he was in custody for more than 48 hours, however the said order was revoked and the respondent had reported to duty on 19.5.1988. According to the writ petitioners, from the very next day i.e., 20.05.1988 the respondent remained unauthorisedly absent from the duty.

16. Be that as it may, on 3.8.1991 the respondent was again detained by the police in connection with the above said criminal cases and he was in custody for more than 48 hours. On that ground, the respondent was again placed under suspension by order dated 8.6.1992 with effect from 3.8.1991 under Rule 5 (2) of the Railway Servants (Discipline & Appeal) Rules, 1968 (for short, "the Rules") which provides for deemed suspension with effect from the date of detention in custody.

17. On 15.9.1992 the respondent was convicted in C.C. No. 95 of 1985. On 10.11.1992 a show-cause notice was stated to have been issued by the writ petitioners calling upon the respondent to show-cause as to why he should not be removed from service under Rule 14 (i) of the Rules on the ground of his conviction in C.C. No. 95 of 1985. Thereafter on 7.5.1993 the penalty of removal from service was imposed on the respondent stating that though the show-cause notice was received by him under clear acknowledgement, he failed to submit his explanation.

18. According to the writ petitioners, the said order of removal dated 7.5.1993 was served on the respondent through the Jail Superintendent, District Jail, Nellore, where the respondent was undergoing imprisonment. It was also the case of the writ petitioners that in spite of their best efforts the respondent did not attend the office to receive the subsistence allowance to which he was entitled to for the period from 3.8.1991 to 7.5.1993. Therefore, having waited till 1998, the issue was treated as closed.

19. Though the conviction in C.C. No. 95 of 1985 was set aside by the appellate Court by judgment dated 9.12.1994, the fact remains that even before his acquittal by the Appellate Court, the respondent was convicted on 7.11.1994 in another case i.e., C.C. No. 135 of 1986. In view of the said conviction, the respondent is not entitled for reinstatement even on the ground of his acquittal by the appellate Court on 9.12.1994. However it is alleged by the respondent that the order of removal stated to have passed on 7.5.1993 was never served

on him and therefore it was nonest. Thus, it was contended before the Tribunal in O.A. No. 596 of 2000 that he was entitled to subsistence allowance from 3.8.1991 onwards notwithstanding the order of removal dated 7.5.1993. The said contention was accepted by the Tribunal and it was held that the petitioners herein failed to show any document to establish their plea that either the show-cause notice or the order of removal dated 7.5.1993 were served on the respondent (applicant therein) in terms of Rule 26 of Railway Servants (Discipline & Appeal) Rules, 1968. Accordingly, O.A. No. 596 of 2000 was disposed of by order dated 12.09.2007 directing the petitioners herein to pay the subsistence allowance due to the respondent herein from the date of suspension/deemed suspension till that date i.e., 12.09.2007. By order dated 17.12.2007 in Review Application No. 26 of 2007 there was a further direction to pass order regarding revocation of the suspension in accordance with law.

20. Having carefully gone through the material available on record, particularly Rule 26 of Railway Servants (Discipline & Appeal) Rules, 1968 which provides the method in which any order, notice or other process shall be served on the Railway Servants, we do not find any justifiable reason to interfere with the finding recorded by the Tribunal below that the order of removal dated 7.5.1993 was not served on the respondent herein. Consequently, as rightly held by the Tribunal the said order dated 7.5.1993 is unenforceable. It may also be mentioned that in view of the subsequent order of removal dated 31.10.2008 passed by the respondents on the very same ground of conviction on a criminal charge, in fact the earlier order dated 7.5.1993 has virtually become superfluous.

21. However, so far as the direction to revoke the order of suspension as per the order in the Review Application No. 26 of 2007 is concerned, it appears to us that the said direction on the face of it is erroneous. As noticed above, the fact that the respondent was detained in custody on 3.8.1991 for more than 48 hours is not in dispute. Though his conviction in C.C. No. 95 of 1985 was set aside on appeal, admittedly he was convicted in C.C. No. 135 of 1986 on 7.11.1994, even before his acquittal by the appellate court. Hence the question of revocation of suspension does not arise at all. In fact it was not anybody's case that the order of suspension was liable to be revoked, but the whole controversy was with regard to the validity of the order of removal dated 7.5.1993.

Point No. 2:

22. While W.P. Nos. 10710 & 12355 of 2008 are pending, the writ petitioners initiated fresh proceedings under Rule 14 (i) of Railway Servants (Discipline & Appeal) Rules, 1968 and a show-cause notice dated 27.8.2008 was issued calling upon the respondent to show-cause as to why he should not be removed from service from the date of his conviction in C.C. No. 135 of 1986 on 7.11.1994. The explanation submitted by the respondent that the proposal to remove from service w.e.f. 7.11.1994 was illegal and not permissible under law was not accepted and thus a fresh order of removal dated 31.10.2008 came to be passed imposing the punishment of removal from service w.e.f. 7.11.1994.

23. The fact that the said order dated 31.10.2008 was served on the respondent herein is not in dispute. However, he failed to prefer the appeal within the period of 45 days prescribed under Rule 20 of the Railway Servants (Discipline & Appeal) Rules, 1968. Though the proviso to Rule 20 empowers the appellate authority to entertain the appeal preferred after the period of limitation on being satisfied that sufficient cause is made out for the delay in submission of the appeal, the appellate authority by order dated 27.11.2009 rejected the appeal of the respondent as time-barred holding that no satisfactory explanation was offered for the abnormal delay.

24. When the respondent herein assailed the said order of the appellate authority by filing O.A. No. 246 of 2010, though the Tribunal below did not express any opinion as to the correctness of the rejection of the appeal on the ground of delay, went into merits of the case and held that the order of removal would be effective from 31.10.2008 but not with retrospective effect from 7.11.1994.

25. Assailing the said order, the learned counsel for the writ petitioners at the outset contended that the Tribunal below ought not to have gone into the merits of the case since the respondent's appeal against the order of removal was rejected as barred by limitation.

26. Having regard to the fact that the matter has already undergone several rounds of litigation, we are not inclined to stand on technicalities and remand the matter to the Tribunal for consideration of the question as to whether the appellate authority was justified in dismissing the appeal as barred by limitation. Instead, we deem it appropriate to give a quietus to the controversy by considering the matter on merits.

27. So far as the merits of the case are concerned, the learned counsel for the writ petitioners contended that having regard to the admitted fact that the respondent was convicted in C.C. No. 135 of 1986 by order dated 7.11.1994, he is not entitled to continue in service any longer and therefore the removal from service w.e.f. 7.11.1994 has been rightly ordered in exercise of the powers conferred under Rule 14 (i) of the Railway Servants (Discipline & Appeal) Rules, 1968. It is also contended that the impugned order of the Tribunal directing to pay subsistence allowance till the order of removal dated 31.10.2008 is unjustified since it virtually amounts to compelling the petitioners to make the payments for a long period of 14 years in spite of the fact that the respondent is a convicted employee and has not been in service.

28. We do not find any substance in the above said contentions of the learned counsel for the writ petitioners.

29. The Railway Servants (Discipline & Appeal) Rules, 1968 were made in exercise of the powers conferred by the proviso to Article 309 of the Constitution of India. Removal from service is one of the major penalties provided under Rule 6 of the Rules and the procedure to be followed for imposing major penalties has been specified in Rules 9 & 10. Rules 11 to 13 deal with the procedure for

imposing minor penalties and communication of the orders. Rule 14 is a special provision which empowers the disciplinary authority to impose the penalty without complying with the procedure prescribed under Rules 9 to 13. For proper appreciation, Rule 14 is extracted hereunder:

R.14. Special procedure in certain cases:- Notwithstanding anything contained in Rules 9 to 13--

(i) where any penalty is imposed on a Railway servant on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold an enquiry in the manner provided in these rules:

The disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit;

Provided that the Railway servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case falling under clause (i) above:

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this Rule.

(emphasis supplied)

30. A reading of the above provision shows that in the three circumstances specified therein, the appropriate penalty can be imposed by the disciplinary authority dispensing with the enquiry contemplated under the said Rules. Admittedly in the present case the order of removal came to be passed under Rule 14 (i) which provides for imposing a penalty on a Railway Servant on the ground of conduct which has led to his conviction on a criminal charge.

31. At the outset, it is to be noticed that though no enquiry need be conducted before imposing the penalty under Rule 14 (i), the 1st proviso makes it clear that an opportunity has to be given to the Railway Servant to make his representation on the penalty proposed to be imposed before any order is made. Thus it is evident that conviction by a Criminal Court does not automatically lead to removal from service. The language of Rule 14 (i) is clear that mere conviction by itself should never be made the basis for imposing the penalty on the employee, but the conduct which has led to conviction of a Railway servant on a criminal charge requires to be taken into consideration. The enquiry is dispensed with only where action is proposed to be taken on the ground of such conduct of the employee which has led to his conviction on a criminal charge. Thus it is clear that the disciplinary authority is bound to take into consideration the

circumstances and apply his mind before imposing a penalty even under Rule 14 (i) of the Rules on the ground that the Railway Servant is convicted on a criminal charge and under no circumstances the removal from service would be the automatic consequence of the conviction on a criminal charge. Moreover in view of the 1st proviso to Rule 14 which requires that the Railway servant would be given an opportunity of making his representation, the only conclusion that can be reached is that the appropriate penalty can be imposed by the disciplinary authority only after assessing the gravity or otherwise of the conduct which has led to the conviction of a Railway servant. As explained in *The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others*, the conviction of the delinquent employee would be taken as sufficient proof of misconduct and then the authority will have to embark upon a summary enquiry as to the nature and extent of the penalty to be imposed on the delinquent employee and in the course of the enquiry if the authority is of the opinion that the offence is too trivial or of a technical nature it may refuse to impose any penalty in spite of the conviction.

32. In the light of the legal position noticed above, we are of the opinion that the conviction of the respondent herein in C.C. No. 135 of 1986 on 7.11.1994 does not automatically result in his removal from service. Even under Rule 14 (i) of the Rules, the disciplinary authority is required to give an opportunity of making representation to the Railway servant with regard to the penalty proposed to be imposed and after considering such representation and on application of mind to the conduct of the employee, the gravity of the misconduct committed by him resulting in his conviction and take a decision with regard to the nature and extent of the penalty to be imposed.

33. Therefore, the order dated 31.10.2008 imposing the penalty of removal from service can be effective only from that date. The contention on behalf of the writ petitioners that it should be from the date of his conviction in C.C. No. 135 of 1986 is apparently on an erroneous assumption that the removal from the service is automatic on conviction on a criminal charge.

34. We may also add that the law is well-settled that power vested in a statutory authority can be exercised only with prospective effect unless the statute itself empowers the authority to exercise the power with retrospective effect. Therefore, the writ petitioners are not competent to impose the penalty of removal from service with retrospective effect since no such power is conferred under *Railway Servants (Discipline & Appeal) Rules, 1968*. Hence the Tribunal below has rightly relied upon *R. JEEVARATNAM'S* case (2 supra) and declared that the order of removal dated 31.10.2008 should be effective only from 31.10.2008 but not w.e.f. 7.11.1994.

35. For the reasons stated above, the order of the Tribunal in O.A. No. 246 of 2010 cannot be said to have suffered from any illegality or error apparent on the face of the record. Hence it warrants no interference by us. We have already held that the order in O.A. No. 596 of 2000 is also unexceptionable. However, we

make it clear that by virtue of the subsequent order passed in O.A. No. 246 of 2010, which is now upheld by us, the respondent herein shall be entitled to subsistence allowance till the date of removal i.e., 31.10.2008.

36. So far as W.P. No. 12355 of 2008 is concerned, we hold that there is no need for revocation of suspension and therefore the order in Review Application No. 26 of 2007 is hereby set aside.

37. In the result, W.P. No. 20590 of 2012 is dismissed and W.P. Nos. 10710 & 12355 of 2008 are disposed of with the above clarifications. No costs. Miscellaneous petitions, if any, pending shall stand closed.