**(1997) 10 BOM CK 0044**

**In the Bombay High Court**

**Case No :** First Appeal No. 696 of 1968

The State of Maharashtra APPELLANT

Vs

Kashinath Dagadu Sanap RESPONDENT

**Date of Decision :** 12-10-1997

**Acts Referred:**

Constitution of India, 1950 — Article 311

**Citation :** (1978) 80 BOMLR 449 : (1978) MhLj 339

**Hon'ble Judges :** Pratap, J;Deshpande, J

**Bench :** Division Bench

**Final Decision :** Dismissed

# Judgement

Deshpande, J.—The plaintiff (respondent herein) was employed as a junior accountant in the office of the Divisional Forest Officer at Vyara in Dhulia district. In 1951, he was drawing in all Rs. 200 per month in the scale of Rs. 100-8-140, inclusive of allowances etc. A charge-sheet came to be framed against him on September 12, 1951 and after inquiry, he was dismissed from, service by an order dated July 15, 1954. The plaintiff then initiated Suit No. 316 of 1956 in the Court of the Civil Judge, Senior Division, Dhulia, (1) for declaration that the order of dismissal was void being in violation of Article 311 of the Constitution, as also (2) for the arrears of salary up to the date of the suit. This suit was decreed on December 30, 1957 and the decree was confirmed in appeal on August 31, 1959 and also in Second Appeal on September 26, 1965 by this Court. It is common ground that he was thereafter reinstated on January 10, 1966. The plaintiff then filed the present suit on December 24, 1966 in forma pauperis claiming arrears of salary from February 25, 1956 till the date of the suit. He claimed in all Rs. 41,488 calculating the same on the footing of what he would have received at enhanced rates, in the ordinary course, but for such wrongful dismissal, by way of increments, and also on promotion, from the date from which his immediate junior was promoted.

2. The defendant denied the liability, on several grounds, including the one of

limitation as to the arrears for more than three years before the date of the suit, and another that increments on promotion and enhanced salaries on account thereof, cannot be claimed as a matter of course. Reference to other points is irrelevant as none were argued before us.

3. The learned trial Judge decreed the claim of the plaintiff to the extent of Rs. 24,890 with interest on Rs. 24,885 and also costs on the sum of Rs. 27,421. The State''s plea as to the bar of limitation was overruled, but its objection to the claim at the enhanced rates was upheld. The State has preferred the appeal, and the plaintiff cross-objections, against this judgment and decree dated March 25, 1968.

4. Mr. Bhonsale, the learned Government Pleader for the State drew our attention to the judgment) of this Court in the case of V.D. Angal Vs. State of Maharashtra, , and the unreported cases referred to therein, as also to the judgment of the Supreme Court in Jai Chand Sawhney Vs. Union of India (UOI), , and several unreported judgments following the same, and contends that, Government servants claim to arrears of salary is held to have been governed by Article 102 of the repealed Limitation Act of 1908 corresponding to Article 7 of the present repealing Act, and the Courts are held incompetent to pass decrees for arrears of more than three years prior to the date of suit. He, therefore, contends that the decree, to the extent to which it covers arrears of pre-December 24, 1963 period, is liable to be set aside. Mr. Deshmukh, the learned advocate appearing for the respondent, relies on the judgment in The State of Madhya Pradesh Vs. The State of Maharashtra and Others, , hereinafter referred to as "the Recent case" in support of the decree passed. This was an appeal by the State against the judgment of the Nagpur Bench of our Court in State v. Sarjoo Prasad Gumasta [1968] Bom. 1024, which has taken a different view from the one followed in other cases when Jai Chand''s case was not even decided, much less reported. Mr. Bhonsale, however, sought to distinguish the present case as Jai Chand''s case is not overruled but expressly distinguished, in para. 33 of the "Recent case" and contends that the ratio of Jai Chand''s case still holds the field.

5. Till the Recent Supreme Court case, it was consistently held by this Court, even before Jai Chand''s case (supra) and thereafter (1) that a suit for arrears of salary by a Government servant is governed by the then Article 102 of the Limitation Act, 1908 and (2) right to receive monthly salary accrues to him at the end of each month and (3) a suit for arrears of salary for any month beyond three years therefrom is time-barred. In Jai Chand''s case as also in most of the other cases relied on by Mr. Bhonsale, the dismissal orders were found to be void ab initio because of the failure to observe certain basic procedural safeguards guaranteed under Article 311 of the Constitution. The ratio of these cases is based on the reasoning that when orders are found to be void and non est, existence thereof on paper could not have prevented the Government servant from claiming the same month to month, and institute a suit within three years

 

from the date of the accrual of the right thereto. Attention of the Court was drawn to the Fundamental Rules 52 to 54 or the corresponding Rules 24, 150 to 152 of the B.C.S.R., under which the claim of the Government servant to monthly salaries is expressly declared to have "ceased" with his suspension, removal or dismissal. The Government servant was helpless indeed when the Rules expressly made his claim to salary and other attending benefits to "cease" with such orders and even his suit for such arrears was liable to dismissal during the subsistence of such orders. He was driven to be content with pittance of allowance during the suspension period, permissible under the Rules. This patent disability, however, could not prevail with the Courts excepting in Nagpur Bench case under appeal in the Recent case, on the grounds that (1) with dismissal being declared to be void the consequential disability turns out to be non-existent retrospectively from its supposed inception, and (2) plaintiff himself bases his claim on such orders being non est. In, Jai Chand''s case (supra) Shah J. observed as follows (p. 644):

...When the order of dismissal or removal is set aside by the Court on the ground of failure to afford the constitutional protection, the order is declared invalid ab initio, i.e. as if it in, law never existed, and the public servant concerned was unlawfully prevented from rendering service. If that be the correct view, salary due to the public servant concerned must be deemed to have accrued month after month because he had been wrongfully prevented from rendering service. The period of limitation under Article 102 commences to run when the wages ''accrue due'', and wages accrue due when in law the servant becomes entitled to wages. Rule 2042 of the Railway Establishment Code merely provides that ''the pay and allowances of a Railway servant who is removed or dismissed from service cease from the date of the order of removal or dismissal''. That rule does not operate to make the wages accrue due on the date of the institution of the suit. If the order of dismissal is set aside the public servant is deemed to be in service throughout the period during which the ''order of dismissal remained operative, and his right to sue for salary arises at the end of every month in which he was unlawfully prevented from earning the salary, which he could, but for the illegal order of dismissal, have earned. (Italics supplied).

6. This very contention, however, has now found favour in the Recent Supreme Court case. Chief Justice Ray speaking for the Court, emphasised how cause of action to claim salary could arise only on reinstatement, and accepted the very above contention in the following words (p. 296):

...Three features are to be borne in mind in appreciating the plaintiff''s case from the point of view of limitation. First the plaintiff became entitled to salary for the period September 16, 1943 upto the date of reinstatement on December 12, 1953, only when pursuant to the decree dated August 30, 1953 there was actual reinstatement of the plaintiff on December 12, 1953. Second, the plaintiff was again suspended on January 19, 1954 and was dismissed on February 23, 1956. The Madhya Pradesh Government on March 5, 1954 decided that during the period of first suspension till his reinstatement on December 12, 1953 he was not entitled to salary. Again on January 28, 1956 the Madhya Pradesh Government decided under Fundamental Rule 54(iii) that during the period of suspension from September 16, 1943 to December 12, 1953 and again from January 19, 1954 to February 23, 1956 he would not be entitled to any payment of allowances.

On these facts two consequences arise in the present appeal. First, since the plaintiff was under suspension from September 16, 1943 till December 12, 1953 when he was reinstated and again suspended from January 19, 1954 till February 23, 1956 when he was dismissed, his suit on October 6, 1956 is within a period of three years from the date of his reinstatement on December 12, 1953. Second, during the period of suspension he was not entitled to salary under Fundamental Rule 53. Further decision to that effect was taken by the Madhya Pradesh Government on January 28, 1956 under Fundamental Rule 54. Therefore, the plaintiff''s cause of action for salary for the period of suspension did not accrue until he was reinstated on December 12, 1953. The plaintiff''s salary accrued only when he was reinstated as a result of the decree setting aside-the orders of suspension and of dismissal.

(Italics supplied).

7. That such claims are governed by Article 102 of the Limitation Act is not disputed even in the Recent case. This is taken to be the settled law since Punjab Province v. Tara Chand AIR[1947] F.C. 23 : 49 Bom L.R. 697. The dispute centres round as to when the right to sue accrues, i.e. whether at the end of each month, without being affected by the subsisting suspension and dismissal orders, found by the Courts after trial of the suit to be non est, as held by Jai Chand''s case (supra), and other cases or on setting aside the dismissal order and reinstatement, as held in. the Recent Supreme Court case. The above passages from the two judgments clearly show that approach of the Supreme Court in the Recent case as to the effect of the Fundamental Rules or corresponding Rules of B.C.S.R., on Government servants claim to the salary during the subsistence of the suspension or dismissal orders, is wholly irreconcilable with its approach reflected in Jai Chand''s and our High Court''s approach in Dr. Angal''s cases (supra). The views of the Supreme Court in the Recent case upholding the judgment of Nagpur Bench (supra) accords with the views of the Madras High Court in the case of State of Madras Vs. A.V. Anantharaman, , which is followed by the Nagpur Bench but has been expressly disapproved in Jai Chand''s and Dr. Angal''s cases. In other words ratio of Jai Chand''s case is as good as overruled. The continued disability of the Government servant to enforce his claim during the de facto subsistence of these orders, notwithstanding its being held subsequently to be void, and ineffective retrospectively from its inception, is now taken into account, while interpreting the words "when the wages accrue due" in the third column of Article 102, in the same manner as Section 15 of the Limitation Act requires the Court to exclude that time, from the period of

 

limitation prescribed for any action, during which orders of stay or injunction prevent any litigant from having recourse to suit, even if ultimately such orders are found to be legally unmerited. Jai Chand''s case, however, refuses to take notice of actual subsistence of such orders and their legal effect. Jai Chand''s case lays more stress on the legal nature of such orders and contention of the plaintiff in regard thereto and almost ignores his forced disability to move in the matter.

8. It is true that the Recent case not only does not expressly overrule Jai Chand''s case but purports to distinguish it as also another case of Sakal Deep Sahai Srivastava Vs. Union of India (UOI) and Another, . The question as to the date of accrual of cause of action did not directly crop up for discussion in Sakal Deep''s case as also in the earlier another case of Madhav v. Stats of Mysore [1962] AIR : 64 Bom L.R. 396, relied on in Jai Chand and Dr. Angal cases. Though in both these cases Article 102 of the Limitation Act is held to be applicable to such claims, plaintiffs in both these cases were merely reverted and continued to serve in the lower post and question of the effect of suspension, dismissal or removal orders on their claim to salaries or other benefits could not arise, to warrant any discussion as to the effect of these rules on such orders. Not that this, in principle, could make any difference as reversion disables the Government servant from claiming salary of the higher post as does the effect of these Rules. Suffice it to note that there was no occasion to discuss the same. It is true that Jai Chand''s case does not refer to the orders of suspension as such at all, though constant reference to these is to be found in the Recent case. Ratio of the Recent case, however, does not appear to turn so much on the orders of suspension as on the language of the Fundamental Rules which results in the cessation of the claim of the Government servants to their salaries from the date of dismissal or removal or suspension. That orders of suspension and dismissal, virtually stood on the same footing as these Fundamental Rules, is emphasised by the learned Chief Justice by reference to Khem Chand v. Union of India9 at the end of the judgment in the following words (p. 298):

...See Khem Chand v. Union of India where this Court said that the real effect of the order of suspension is that though he continues to be a member of the service he is not permitted to work and is paid only subsistence allowance which is less than his salary. Under Fundamental Rule 52 the pay and allowance of a government servant who is dismissed or removed from service, cease from the date of his dismissal or removal. Therefore, there would be no question of salary accruing or accruing due so long as orders of suspension and dismissal stand.The High Court was correct in the conclusion that the plaintiff''s claim for salary accrued due only on the order of dismissal dated February 23, 1956 being set aside.

(Italics supplied).

9. The language in this passage also militates against the reasoning in Jai Chand''s case as also against the earlier passage in it, casually indicating as if Jai

 

Chand''s case was being distinguished. It is thus difficult to escape the conclusion that the underlying reasoning in Jai Chand''s case is incompatible with the reasoning in the Recent Supreme Court case. The Recent case having been decided by a larger Bench, has to be followed by us. The plea of limitation in this case, therefore, shall have to be determined by reference to the Recent case and disregarding the ratio of Jai Chand''s case.

10. First quoted passage from the Recent judgment gives an impression that right to claim arrears accrues from the date of reinstatement, while the second passage emphasises the date on which the order of dismissal is set aside. Obviously difference of these dates did not make any difference to the conclusion in that case and the Court had no occasion to apply its judicial mind as to which of these dates would turn out to be starting point of limitation under Article 102. It is, however, clear to us that the date on which dismissal order is set aside and not the date of reinstatement would be determinative of the starting point of limitation. The prohibition! or disability to claim salary created by the Rules cease to operate with orders of dismissal, etc. going out of the way and the right to claim arrears at once gets revived. The date of reinstatement does not appear to have any relevance to the operation of these rules.

11. Arrears of salary in this case are claimed from the date of the earlier suit, i.e. February 25, 1956 to the date of the present suit, i.e. December 24, 1966. The decree setting aside the order of dismissal was passed on December 30, 1957. Claim for arrears of salary for the period from February 25, 1956 to December 23, 1963 had become prima facie time-barred on December 24, 1966 being the period prior to three years from the date of suit and being even beyond three years from the date of decree, i.e. December 30, 1957. No attempt is made by the plaintiff to expressly explain this delay. However, pendency of the appeal and Second Appeal created doubt in our mind about the execution having been stayed. We sent for the records of Second Appeal No. 105 of 1960. Even the surviving papers indicate that execution of decree was stayed. Thus period of limitation could start only from December 30, 1957 when the dismissal order was set aside. Suit for arrears however could not be instituted because of the stay orders in pending appeals till September 26, 1965. This period is liable to be excluded u/s 15 of the Limitation Act. Suit on December 24, 1966 was thus well within time. State appeal is thus liable to be dismissed.

12. Now, as indicated earlier, Cross Objections of the plaintiff are confined to the amount which the trial Court has refused to decree. As against the claim of Rs. 41,488.64, the trial Court has decreed the claim only to the extent of Rs. 27,421. The learned Judge appears to us to be right in holding that, efficiency bar cannot be assumed to have been allowed to be crossed unless the competent authority had occasion to apply its mind to the calibre, efficiency and the performance of the employee concerned. In the absence of any such orders, the plaintiff cannot be held to have been entitled to the increments as a matter of course. The circumstances in which the authorities could not get an opportunity to apply their

 

minds are not relevant at any rate having regard to the pleadings in the present case. The reasoning of the learned trial Judge with regard to the promotion stands on stronger footing. It is well settled that no employee can claim promotion as a matter of right. Promotion depends not merely on seniority but on the merit and the performance of each one of the Government servant. He cannot claim salary of the promotional post merely because his junior was promoted during the time he was under suspension, or removed or dismissed from service. At least there is no material to justify any conclusion that efficiency bar could have been allowed to be crossed or plaintiff could necessarily have been promoted. In this view of the matter, we are unable to interfere with the decree passed by the trial Court. Cross-objections are also liable to be dismissed. Appeal and cross-objections are thus dismissed.

13. In the circumstances of the case there will be no order as to costs.