
(1997) 05 RAJ CK 0041

In the Rajasthan High Court

Case No : Civil Writ Petition No. 4965 of 1990

Tulsi Das

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-05-1997

Acts Referred:

Citation : (1997) 2 RLW 1296 : (1997) 3 WLC 174 : (1997) 1 WLN 531

Hon'ble Judges : B.J. Shethna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.J. Shethna, J.—The petitioner who belongs to a scheduled caste of ""HARIJAN"" was working as Class IV servant as "SAFAIWALA" with the Airforce, has challenged his impugned order of termination dated 13.10.87 passed by the Respondent No. 3, the AOC-IN-C, HQ. SWAC IAS, Jodhpur in this petition and prayed to quash the same and to reinstate him in service with back wages and to grant all consequential benefits of service.

2. Initially, on 28.11.90 notice was issued by the learned Single Judge of this Court to the respondents to show cause as to why this petition should not be admitted. In spite of service, none appeared for the other side. Therefore, on 26.8.91 this petition was admitted and again notice of admission was ordered to be issued to the other side. On 17.1.92 it was ordered to be put up for final hearing on 5th Feb. 92. But for some or the other reasons it could not be heard on that date. On 2.9.92 it was heard by Hon"ble R.S. Verma, J. (as he then was. At that time learned Counsel Sh. Nanda for the petitioner raised the contention that the order of discharge Annex. R-5 was bad as the: same was not implemented within 14 days as mentioned in the order itself. He wanted time to show the law on this point and the matter was treated as part heard and adjourned to 14.9.92. Then it was adjourned to 9.10.92 at the request of Sh. Nanda. On 24.2.93 it was adjourned at the request of Sh. Lal for Sh. Choudhary for the respondent. On 22.3.93 the matter was treated not as part-heard by Sh.

R.S. Verma, J. Finally, this matter came to be heard fully for about two days by me and certain suggestions were made to both the parties by the court considering the peculiar facts and circumstances of the case. The learned Counsel appearing for the parties requested the Court to pass an appropriate order in the matter. Sh. Nanda for the petitioner made a statement on behalf of the petitioner that he does not want back wages and he is mainly concerned with the pensionary benefits, therefore, the impugned order be set aside so that the petitioner can get atleast pensionary benefits, as he had put on more than 16 years in service.

3. I must state that initially Mr. Lal, learned Counsel appearing for the respondents, tried to support the impugned order but the same was not pressed much and it was left to the court to pass an appropriate order in the case without going into the merits of the case and legality and validity of the order. Accordingly, in the interest of justice and considering over all facts and circumstances of the case the impugned order dated 13.10.89 was set aside and the petitioner treated as retired from service w.e.f. 28.2.93 on completing 20 years of service, but no other benefits of service including back wages etc. were granted to the petitioner. Thus, he was given only pensionary benefits. It was passed on 3.11.95. It was more or less a consent order. However, only Union of India challenged the same by way of D.B. Spl. Appeal No. 387/96 before this Court. The appeal came to be allowed at the admission stage itself on 8.1.97 by a Judgment running into typed 11 pages by the Division Bench (quorum: Mr. M.G. Mukharjee, C.J. and Mr. Bhagwati Prasad, J.) and the matter was remanded with a direction to rehear it on merits and decide the same in accordance with law preferably within three months from the date of the order. As per the order passed by the Division Bench of this Court the hearing of the main writ petition was expected to be over within three months i.e. before 7.4.97. Surprisingly, on an application made by the learned Counsel for the petitioner the office after obtaining an order on the submission made on 3.4.97 put up the case before Bhagwati Prasad, J. on 9.4.97 who was a party to the Judgment in Appeal. On 9.4.97 the case was adjourned for one week by Bhagwati Prasad, J. on 21.4.97 it came up before Mr. V.G. Palshikar, J. who ordered that the petition be put up for hearing on 5.5.97. Today, it has been placed before this Court.

4. This case was put up at the top of the supplementary cause list. The hearing of the case was supposed to be over within three months as desired and expected by the Hon'ble Judges of the Division Bench, but it could not be over under the aforesaid circumstances within three months, time. The learned Counsel Sh. Choudhary had initially prayed for time. I had granted time to Mr. Choudhary in his other matters but I had to refuse his request for any time in view of the order passed by the Division Bench. Thereafter, Mr. Choudhary argued the matter. Learned Counsel Sh. Nanda firstly submitted that D.B. Spl. Appeal No. 387/96 filed by the Union of India against the order passed by this Court on 3.11.95 in this writ petition itself was not maintainable as the appeal was incompetent in as much as out of four respondents only one respondent i.e. Union of India filed an

appeal and rest of the three respondents were neither appellants in the appeal nor they were joined as respondents. Therefore, the judgment of the Division Bench is noniest and the earlier order passed by this Court be restored. It is true that the appeal was filed by only one respondent out of four. It is also true that the matter was placed for regular admission though there was defect. Appeal as it is it was not maintainable. The original papers of D.B. Spl. Appeal were called for and going through the same I found that there was an endorsement made by the office that the defects arc removed. How? Nobody knows: whatever it may be. But I am of the opinion that once an order is passed by the Division Bench this Court cannot give any verdict about the correctness of the judgment. The petitioner should have either applied for review before the Division Bench or should have challenged it before the Supreme Court.

5. Mr. Nanda submitted that the petitioner is a poor Class IV servant and a scheduled caste man and cannot afford to go to the Supreme Court. He further submitted that while in service the petitioner was suffering from mental sickness and he has suffered a lot by the order passed by the Division Bench in Appeal. I have sympathy for this poor man but nothing more can be done in this regard by this Court.

6. Mr. Nanda then submitted that initially the Division Bench of this Court quorum: M.G. Mukharjee, C.J. and Bhagwati Prasad, J.) issued notice to show cause as to why the appeal should not be admitted but instead of admitting the same the matter was heard and decided at admission stage and allowed on 8.1.97 and the case was remanded to this Court without admitting or placing it for final hearing. He submitted that the appeal was required to be first admitted and then fresh notice was required to be issued to the respondents in the appeal. Froth the record it appears that only notice to show cause was issued and no notice was issued calling upon the respondents to show cause as to why the appeal should not be heard and decided at the admission stage itself. In such circumstances the matter was required to be admitted and placed for final healing. However, learned Counsel Shri Choudhary, for the respondents submitted that no such objection was raised before the Division Bench by the learned Counsel for the petitioner, therefore, now he cannot make such grievance before this Court. Mr. Choudhary is right. It is not open to this Court to go-into all these questions.

7. Mr. Nanda then submitted that it was highly improper on the part of the Union of India to file an appeal against the consent order. Mr. Choudhary for the Union of India submitted that wrong concession given by the counsel before the Single Bench cannot come in the way of Union of India to challenge such order in appeal before Division Bench. It may be stated that after hearing the learned Counsel for the parties I was fully convinced that the impugned order was bad and liable to be set aside, therefore the order was required to be set aside and the petitioner was required to be reinstated in service with full back wages and other consequential benefits of service as if the impugned order was never

passed against him. But, Mr. Nanda pointed out that he would have retired by that time and he would be satisfied with pensionary benefits. Under the circumstances it was left the court by both Mr. Nanda for the petitioner and Mr. Lal for the respondents to pass an appropriate order without recording their consent. Therefore only with a view to save public money, the petition was allowed without awarding any back wages by treating him as retired from service on completing 20 years of service on 28.2.93. In this context, it was observed that "the petitioner is coming from a lowly strata of society. He is "Harijan" belonging to a Scheduled Caste. Considering his long service, record and other circumstances on record. It will be just and proper to wash the impugned order". (Imphasis supplied.)

8. In case of Life Insurance Corporation of India v. Ms. Asha Ram Chandra Ambedkar and Anr. reported in 1994 (2) S.C. 183, the Supreme Court held that "The High Courts and/or the Administrative Tribunals cannot confer benediction impelled by sympathetic consideration. Yielding to instinct will tend to ignore the cold logic of law. The Court is to administer law as to find it, however, inconvenient it may be. The Court should endeavour to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law. Disregardful of law, however, hard the case may be, it should never be done". The case before the Supreme Court was regarding appointment of a person on a compassionate ground by-passing the instructions as well as the statutory regulations. The Apex Court, therefore, held that the LIC being a statutory corporation is bound by the LIC Act as well as the statutory regulations and instructions which could not be put aside by the High Court and it cannot direct appointment on a compassionate ground. The facts of the present case are totally different. There was no question of going beyond the policy or instructions or regulations while setting aside the impugned order. The Impugned order was bad on the fact of it and not sustainable under the law, therefore, it was set aside and it was not set aside only on the compassionate ground. While allowing the appeal and setting aside the order, the Division Bench has held that it was well settled in law that no mandamus could be issued directing to do a thing forbidden by law or impermissible by law. There cannot be any quarrel on the principle laid down by the Division Bench of this Court. But, there is a vast difference in certiorari and mandamus. While allowing the petitioner earlier, this Court issued a writ of certiorari and not of mandamus. The Division Bench has also held that, "It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside". What were the statutory provisions? Not mentioned by, the Division Bench in the order at all. When asked, the learned Counsel for the respondents was also not in a position to point out any such provisions. Be that as it may. Suffice it to say that the petition was allowed on earlier occasion on merits as the impugned order was not in accordance with law and it was not allowed only on the compassionate ground.

9. Mr. Nanda had submitted before me that while passing the impugned order of termination, the authority neither considered the reply to the show cause notice

nor dealt with the same in the order. Hence, it was in clear violation of principles of natural justice and it was liable to be set aside. He also submitted that the petitioner could not have been said to be a "habitual offender". He submitted that there were genuine reasons for the petitioner not to remain present in service. Several other contentions were also tried to be argued by Mr. Nanda for the petitioner. But, the petition was required to be accepted on the aforesaid main contentions. It was clear from the impugned order itself that the respondent No. 3 while passing the impugned order did not at all consider the reply to the show cause notice submitted by the petitioner. If the reply to the show cause notice is not to be considered then what was the need to issue show cause notice? The purpose behind issuing show cause notice is to give full opportunity to the petitioner to satisfy the authority to exonerate him and not to award any punishment. On facts, I was also fully convinced that the authority was wrong in passing the impugned order of termination on the ground that the petitioner was a "habitual offender". Merely because there were three or more punishments against the petitioner, it cannot be said that he was "habitual offender". The authority has to apply its mind to all the surrounding circumstances before punishing him as habitual offender. In the present case it clearly appears that no other circumstances were taken into consideration. Hence, the order was liable to be set aside.

10. Today, Mr. Nanda for the petitioner raised the same contentions which were raised earlier. In addition to that, Mr. Nanda pointed out that now the respondents themselves have issued a circular dated 18th December, 1996 and changed their earlier policy. As per the said circular the petitioner is not a "habitual offender". He submitted that unfortunately it was not available with the petitioner when the Division Bench decided the appeal at the admission stage itself. He submitted that it was the duty of the learned Counsel for the Union of India to point out before the Division Bench that now the policy is changed and the petitioner cannot be said to be a "habitual offender. Mr. Choudhary learned Counsel, conceded that the case of the petitioner is covered as per the new policy. But, his submission was that the new policy would apply in cases which are pending before the authority at the departmental level and not to pending cases before any Court including this Court.; This submission of Mr. Choudhary cannot be accepted in view of Clause 11 of the circular which reads-as under:

Clause 11: "All the cases pending till date at any stage/level, shall be cleared as per the modified policy".

11. This circular ought to have been pointed out to the Division Bench. Unfortunately, the petitioner got the said circular only after the appeal was disposed of by the Division Bench. Mr. Nanda submitted that if the appeal was admitted and some time was given to him then he would have produced the same before the Division Bench.... He submitted that there was no extra ordinary urgency in the matter and the order passed by this Court was already complied with by the respondents and they intact started to pay pension of a meager

amount to the petitioner. In spite of it the appeal was heard and disposed of at the admission stage when many old and important cases are awaiting disposal. He submitted that in this case appeal filed in late 1996 was heard and disposed of by the Division Bench when only notice to show cause was issued against the petitioner who was class-IV servant, "SAFAIWALA. getting a meager sum by way of pension. But, in my opinion except deciding this petition early as desired by the Division Bench, nothing can be done by this Court. Shri Nanda should have made the grievance before the Division Bench and not before this Court.

12. Mr. Choudhary for the respondents submitted that the reply to show cause notice was considered by the respondent No. 3 and there was a separate noting on the file. He submitted that it may not have been referred or dealt with by the authority in the impugned order of termination. He had requested for time for producing the same before this Court. But, in view of the directions given by the Division Bench to decide the appeal preferably within three months, request was rejected. It was too late in a day to make such request. He was supposed to keep everything ready at the time of hearing. That apart, it would not have made any difference because what waived with the authority has not been reflected in the impugned order. We have to read the impugned order as it is. Bare reading of the impugned order shows that the disciplinary authority has neither referred to the reply to the show cause notice nor dealt with the same in the order. Thus, the impugned order was in clear violation of principles of natural justice and liable to be set aside. Thus, on this ground alone, the impugned order was required to be set aside. There is one more ground available to the petitioner viz., the change in the policy as per the latest circular dated 26th December 1996. The case of the petitioner is squarely covered by the said policy and it cannot be said that the petitioner was a "habitual offender". Even Mr. Choudhary has not disputed this fact. His only submission was that it would apply to the cases pending before the Court. This submission cannot be accepted for the simple reason that it is made clear in Clause 11 of the circular itself that it will apply to all the cases pending at any level. It means that it will apply to the cases pending before the Courts also including this Court.

13. In view of the above, this petition is allowed. The impugned order of termination at Annex. R/5 dated 30th October, 1989 discharging the petitioner from service is hereby set aside. Once the impugned order is set aside usual order of reinstatement in service with full back wages and other consequential benefits of service would follow. But, in this case, there is no question of issuing any such direction of reinstatement of the petitioner in service as the petitioner has already completed 20 years of service on 28.2.93, Therefore, instead of directing the respondents to reinstate the petitioner in service, the respondents are directed that they may treat the petitioner as retired from service w.e.f. 28.2.93 and to grant him full back wages till that date and other consequential benefits of service as if his services were never terminated. The respondents shall continue to pay the pensionary benefits to the petitioner which they were paying till January, 1997 which was stopped by them after the order passed by

the Division Bench in appeal on 8.1.97. The respondents shall pay the pension and the arrears pension and the back wages within three months from today and start paying pension immediately and to continue to pay the same to the petitioner every month.

14. Mr. Nanda for the petitioner submitted that this is a fit case in which this Court should award an exemplary cost to the petitioner from the respondents. It is true that now a days it is difficult for anyone to survive and particularly a person like Class-IV servant without money. It is also true that the petitioner has to suffer a lot financially as well as mentally because of the rigid attitude of the respondents. It may not be difficult for the respondents to fight as-they have not to spend from their own pocket. They can easily afford to fight such litigation. But what would be the plight of the poor person like a present petitioner? For him it was the question of his life and death. Under the circumstances, the respondent No.1, Union of India is directed to pay exemplary cost of Rs. 10,000/- (Rs. ten thousand) to the petitioner within one month from today. It shall fix the liability and recover the same from the concerned person, whosoever is found responsible for this litigation.