

(2013) 09 AHC CK 0242

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 43390 of 2013

Union of India and Others

APPELLANT

Vs

Dashrath

RESPONDENT

Date of Decision : 30-09-2013

Acts Referred:

Citation : (2013) 9 ADJ 108 : (2014) 3 ALJ 416 : (2014) 102 ALR 397 : (2014) 140 FLR 708

Hon'ble Judges : Rajes Kumar, J;Manoj Misra, J

Bench : Division Bench

Advocate : A.K. Gaur, for the Appellant; B.N. Singh, D.P. Singh and S.C., for the Respondent

Judgement

1. We have heard Sri A.K. Gaur, learned counsel for the petitioners and Sri B.N. Singh, learned counsel for the respondents. The brief facts of the case are that one Nagai, an Ex-skilled Painter (Grade-II) employed with the Railways was declared medically unfit for all category. He moved an application dated 7.11.1984 before the Competent Authority for giving appointment on compassionate ground to the respondent (Dasrath) claiming him to be his son. The Railway Authorities, thereafter, conducted an enquiry and gave compassionate appointment to respondent (Dasrath) on 10.9.1985 on the post of Temporary Khalasi. Subsequently, the respondent was also promoted to the post of Battery Truck Driver Grade-III. It transpires that Nagai also executed a registered Will deed dated 31.3.1991 regarding his property in favour of the respondent (Dashrath). Later, after the death of Nagai, one Smt. Phoolshwari Devi, on 20.12.1996, moved an application to the Railway Authorities stating that the respondent (Dashrath) is not the real son of late Nagai and that he had obtained compassionate appointment in a fraudulent manner. On the aforesaid complaint of Smt. Phoolshwari Devi, departmental proceedings were initiated. The Enquiry Officer found the charge proved and an order of removal from service was passed by the Competent Authority. This order of removal was challenged vide O.A. No. 37 of 2005 before the Central Administrative Tribunal,

Allahabad (hereinafter referred to as "Tribunal"), which was disposed of with a direction that the applicant may file an appeal. The respondent (Dashrath) thereafter preferred an appeal, which was rejected by the Appellate Authority vide order dated 13.5.2009. Against the order of removal from service as also the appellate order, O.A. No. 591 of 2009 was filed by the respondent (Dashrath) before the Tribunal, which was disposed of by order dated 9.12.2010. Against the order dated 9.12.2010, the petitioners herein preferred Writ Petition No. 23906 of 2011 before this Court whereas the respondent (Dashrath) filed a review petition before the Tribunal itself. The Writ Petition No. 23906 of 2011 was allowed by order dated 26.4.2011 and the order passed by the Tribunal dated 9.12.2010 was set aside and the Tribunal was directed to pass a fresh order, in accordance with law. Consequent to the decision of Writ Petition No. 23906 of 2011, the respondent got his review petition dismissed as not pressed and the matter was taken up afresh by the Tribunal. The Tribunal by the impugned order found that the enquiry proceedings against the claimant (the respondent herein) was initiated at the behest of Smt. Phoolleshwari Devi, who never came forward as a witness to press her complaint during the enquiry proceedings and that no evidence was led during the enquiry proceedings to prove the charges against the claimant (the respondent herein) and from the report of the Enquiry Officer, it appeared that the Enquiry Officer himself examined claimant (the respondent herein) so as to establish the charge, even though no evidence was led against him. Accordingly, the Tribunal set aside the order of removal from service and directed the respondents to the claim-petition i.e. the petitioners herein to treat the applicant in service with full back-wages and all other consequential benefits, which he was, otherwise, entitled to during his service period.

2. Aggrieved by the order passed by the Tribunal, the present writ petition has been filed.

3. The learned counsel for the petitioner submitted that the Tribunal had exceeded its jurisdiction by entering into the merits of the finding recorded by the Enquiry Officer during the enquiry proceedings, particularly, when the enquiry was carried out after following principles of natural justice. He further submitted that, in any view of the matter, full back-wages ought not to have been awarded to the claimant-respondent even if the order of removal from service was found to be illegal.

4. The learned counsel for the petitioner placed reliance on the judgment of the Apex Court in the case of B.C. Chaturvedi Vs. Union of India and others, , so as to contend that the Court while exercising its power of judicial review is not to act as an Appellate Authority and has, therefore, no power to appreciate the evidence on record and substitute its own independent finding. It was submitted that if no evidence was led during the enquiry, then that could have been a ground to remit the matter back to the enquiry officer to complete the enquiry after recording evidence and in such a situation there was no occasion to order reinstatement with full back wages. In support of the said contention reliance

was placed on decisions of the Apex Court in the case of State of Punjab and Others Vs. Dr Harbhajan Singh Greasy, , as also State of Haryana and another Vs. Jagdish Chander, . He also placed reliance on another judgment of the Apex Court in the case of Kendriya Vidyalaya Sangathan and Another Vs. S.C. Sharma, , so as to contend that where the employee had neither pleaded nor placed any material to show that he was not gainfully employed during period he was out of job consequent to an order of removal, full back-wages ought not to be awarded.

5. Per contra, the learned counsel for the respondent submitted that the instant case was a case where there was no occasion to institute an enquiry, much less, to proceed with the same and pass order of removal. It was submitted that as admittedly the respondent was given compassionate appointment on the application of Nagai who held out the respondent to be his son, and the appointment was made after thorough enquiry, as has been stated in paragraph 4 of the writ petition, there was no occasion to act on the complaint of Smt. Phoolshwari Devi and, in any case, to proceed with the enquiry when the complainant-Smt. Phoolshwari Devi had not appeared before the Enquiry Officer as a complainant to prove her allegation that the respondent was not the son of Nagai. It has been submitted that the order of removal from service was completely unwarranted and as there was no misconduct on the part of the respondent on which the order of removal could be sustained, the respondent was rightly awarded full back-wages by the order of the Tribunal.

6. Having considered the submissions of the learned counsel for the parties and on perusal of the record, we find that it is undisputed that the respondent (Dashrath) was appointed in the year 1985 on compassionate ground on the application of late Nagai, who was alive at that time. It is not disputed that Nagai had held out that the respondent was his son. From paragraph 4 of the writ petition, it is clear that the Railway Authorities gave appointment to Dashrath (the respondent) on the application of Nagai claiming the respondent as his son, after thorough enquiry. It also appear from the said paragraph of the petition that Nagai had executed a registered Will deed dated 31.3.1991 in favour of the respondent and in pursuance thereto the name of the respondent was entered in the revenue record after the death of Nagai.

7. The record further reveals that the enquiry was set up against the respondent on the complaint of one Smt. Phoolshwari Devi, who made the complaint sometimes in the year 1996. The complaint was to the effect that the respondent was not the real son of Nagai and that he obtained compassionate appointment fraudulently. On this complaint, enquiry proceedings were held but in the enquiry proceedings no one appeared as a witness against the respondent including the complainant herself. The report of the Enquiry Officer, which has been enclosed as Annexure 3 to the writ petition, reveals that the Enquiry Officer considered the own statement of the respondent, wherein he claimed himself to be an adopted son of Nagai, and finding discrepancies in his statement with regards to

whether Nagai was his Mama (brother of mother) or Phoopha (husband of father's sister), as also that the adoption deed was unregistered and that inspite of it being of the year 1972, the name of the respondent continued in the Pariwar Register of his natural parents, concluded that the claim of adoption was not proved and hence, the charge against the petitioner stood established.

8. The Tribunal did not accept the finding returned by the Enquiry Officer as neither any evidence was led, nor the complainant was examined, in support of the charge against the respondent. The Tribunal further found that Nagai had remained alive for a long time after the compassionate appointment was given to the respondent, and he never made any complaint to the effect that the respondent was not his adopted son. The Tribunal also observed that the enquiry was carried out in a sketchy manner inasmuch as it started on 23.11.1998 and was concluded on the next date without examining relevant and important witnesses to verify the truth of the allegations. Accordingly, the Tribunal set aside the order of removal and gave the consequential relief to the respondent.

9. We do not find any apparent error in the reasoning adopted by the Tribunal. It would be relevant to note that the appointment of the respondent was made not on the own representation of the respondent but on the representation of Nagai who was an employee of the petitioners, and who sought compassionate appointment of the respondent, in his place, by claiming the respondent to be his son. The record further reveals that respondent was a legatee under the Will left by Nagai. The complaint by Smt. Phoolshwari Devi, appears to be for the purpose of raising a claim to the property left by Nagai. Even assuming that the respondent remained recorded in the Pariwar Register of his natural parents, it would not be such a clinching evidence so as to hold that the respondent played fraud on the Railway Administration for seeking appointment, particularly, when it is admitted on record that the appointment was made on the application of Nagai, who claimed the respondent to be his son. In such a situation, we are of the considered view that there was no real occasion to hold an enquiry and, in any case, to continue with it when the complainant herself did not turn up in support of the charges.

10. With regards to the grant of full back wages, Sri B.N. Singh, learned counsel for the respondent, has drawn attention of the Court to sub-rule (3) of Rule 1345 of the Railway Establishment Rules so as to contend that where the order of dismissal, removal or compulsory retirement of a railway servant is set aside by the Court on the merits of the case, the period intervening between the date of dismissal, removal or compulsory retirement including the period of suspension preceding such dismissal, removal or compulsory retirement, as the case may be, and the date of reinstatement shall be treated as duty for all purposes and he shall be paid the full pay and allowances for the period, to which he would have been entitled, had he not been dismissed, removed or compulsorily retired or suspended. Sri B.N. Singh also cited decision of the Apex Court in the case of Hindustan Tin Works Pvt. Ltd. Vs. The Employees of Hindustan Tin Works Pvt.

Ltd. and Others, , so as to contend that where the employer is found to be in the wrong as a result of which the workman is directed to be reinstated, the employer could not shirk its responsibility of paying the wages which the workman has been deprived of by the illegal or invalid action of the employer. Placing reliance on the decision of the Apex Court in the case of P.G.I. of M.E. and Research, Chandigarh Vs. Raj Kumar, , he further submitted that the award of back wages is in the discretion of the Tribunal and once such discretion has been exercised it should not ordinarily be interfered in exercise of power under Article 226 of the Constitution of India.

11. In reply to the said submission, Sri A.K. Gaur, submitted that in the instant case Rule 1345(2) of the Railway Establishment Rules would be applicable and not Rule 1345(3).

12. We have carefully perused the Rule 1345 of the Railway Establishment Rules, which have been brought on record vide Annexure C.A. 2 to the counter-affidavit. Sub-rule (2) of Rule 1345 relates to a case where the removal or compulsory retirement of railway servant is set aside by the Court solely on the ground of non-compliance with the requirements of Clause (1) or clause (2) of Article 311 of the Constitution, and where he is not exonerated on merits. Whereas in the instant case, we find that there was no evidence to prove the case on merits against the respondent as also, in the facts of the case, there was no real justification to hold and, in any case, to proceed with the enquiry, particularly, when the complainant did not turn up in support of the charge. We are, therefore, of the view that sub-rule (3) of Rule 1345 would be applicable and not sub-rule (2). It would be useful to recapitulate that we have found the enquiry to be completely misconceived inasmuch as the respondent had not sought for appointment by claiming himself to be the son of Nagai but it was Nagai who had himself applied to the Railway Administration to appoint the respondent, whom he claimed to be his son. Therefore the proceedings against the respondent for playing fraud on the railway establishment by claiming himself to be son of Nagai was completely unwarranted and in any case there was no occasion to proceed further against the respondent when the complainant, who had disputed the status of the respondent as an adopted son of Nagai, had herself not come forward before the Enquiry Officer. In such circumstances, the sub-rule (3) of Rule 1345 of the Railway Establishment Rules applies with all force and for that reason no fault can be found with the order of the Tribunal whereunder full back-wages and all other consequential benefits have been allowed. No doubt, the Court/tribunal may not award full back wages, particularly, when it is shown that the employee or workman was gainfully employed elsewhere during the intervening period or where the punishment order is set aside not on merits but on technical grounds. But here, as we have found, the enquiry was completely misconceived, therefore, the award of back wages by the tribunal was well within its discretion and the same requires no interference under Article 226 of the Constitution. However, we do feel that award of interest @ 9% on the arrears of pay is a bit too harsh, which we

dispense with. Subject to above, the writ petition is dismissed.