

(2004) 05 AHC CK 0066
In the Allahabad High Court
Case No : Second Appeal No. 2886 of 1987

Union of India (UOI)	Vs	APPELLANT
Ganesh Pandey and Others		RESPONDENT

Date of Decision : 27-05-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Railway Protection Force Rules, 1959 — Rule 47

Citation : (2004) 4 AWC 3476 : (2004) 102 FLR 857

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : Lal Ji Sinha, C.S.C., Vinod Swaroop, Rakesh Shukla and Avinash Swaroop, for the Appellant; D.S.P. Singh, G.D. Mukherji, V.K. Srivastava, S.P. Misra and V.K. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—The plaintiff was appointed as a "rakshak" on 22.10.1977 in the Railway Protection Force against a clear permanent vacancy. On 18.6.1981 a criminal case was registered against him, in which, it was alleged that the plaintiff had stolen two bags of fertilizer from the Railway wagon, which were recovered from his quarter. During the pendency of the criminal proceedings, the plaintiff was suspended and by an order dated 10.11.1981 passed by the Assistant Security Officer, Varanasi, the plaintiff was removed from the service w.e.f. 11.11.1981 under Rule 47 of the Railway Protection Force Rules, 1959 (hereinafter referred to as the Rules). The plaintiff filed a departmental appeal, which was rejected by the appellate authority on 3.2.1982. The plaintiff thereafter, filed a review petition, which was also rejected. The plaintiff, thereafter, served a notice u/s 80, C.P.C. on 2.3.1984, which was duly served upon the defendant and after the expiry of the period of two months, filed a suit for a declaration praying that the order of removal dated 10.11.1981 from the service was illegal, arbitrary, void and without jurisdiction and that the plaintiff be declared to be in service and entitled to get the salary and allowances and all

consequential benefits,

2. The plaintiff contended that the order of removal dated 10.11.1981 was in violation of Rule 47 of the Rules. The order of the Disciplinary Authority dispensing with the enquiry was illegal inasmuch as no reason for dispensing with the enquiry was recorded. The plaintiff further contended that the order of removal was violative of Articles 14, 16 and 311 of the Constitution of India.

3. It may be stated here that pursuant to the criminal case lodged against the plaintiff, the plaintiff was convicted, against which, the plaintiff filed a criminal appeal, which was allowed by the Sessions Judge vide judgment dated 26.10.1983 and the conviction was set aside and the plaintiff was acquitted from the charges framed against him.

4. The defendant contested the suit and denied the plaintiff's allegations. The defendant contended that pursuant to the conviction in criminal proceedings, the plaintiff was removed from the service w.e.f. 11.11.1981 and that the Disciplinary Authority was justified in dispensing with the enquiry under Rule 47 of the Rules.

5. The trial court after framing the issues and after considering the evidence brought on record, dismissed the suit of the plaintiff.

6. Aggrieved by the decision of the trial court, the plaintiff filed an appeal which was allowed and the suit of the plaintiff was decreed with cost throughout. The appellate court set aside the order dated 10.11.1981 and further declared that the plaintiff continued to remain in service and was entitled to get the salary, allowances, increments and other consequential benefits. The appellate court held that the reasons for dispensing with the enquiry, as contemplated under Rule 47 of the Rules, was not given by the Disciplinary Authority and, therefore, the dispensation of the enquiry was in violation of the principles of natural justice. The appellate court further directed the defendants to conduct the departmental enquiry in accordance with the Rules, if so advised.

7. Aggrieved by the judgment of the lower appellate court the defendants have filed the present second appeal u/s 100 of the Civil Procedure Code. At the time of the admission of the appeal, the following substantial questions of law were framed, namely :

(A) Whether the suit was not barred by the provisions of Section 34 of Specific Relief Act.

(B) Whether the plaintiff- respondent could challenge the order dated 10.11.1981 after the same had merged in the appellate and revisional orders.

8. Heard Sri Vinod Swarup, the learned counsel for the appellant and Sri V. K. Agarwal, the learned counsel for the plaintiff-opposite party.

9. Learned counsel for the appellant contended that the plaintiff had filed an appeal before the higher authority against the order of his removal, which had

been rejected and thereafter, he filed a review petition, which was also rejected. The learned counsel for the appellant submitted that the order of the Disciplinary Authority dated 10.11.1981 merged with the appellate order and thereafter, with the order passed on the review application. The learned counsel submitted that since the original order of removal had merged with the appellate and revisional order, it was no longer open to the plaintiff to challenge the original order of removal and that he could only challenge the appellate order and the revisional order, which in the present case had not been done. The appellant, therefore, submitted that no relief could be granted by the civil court and that the suit was not maintainable in view of Section 34 of the Specific Relief Act. On the other hand, the learned counsel for the plaintiff-respondent submitted that this ground was never taken by the defendants before the trial court or the appellate court and, therefore, the defendant-appellant could not be permitted to set up a new case in the second appeal or raise a new issue, which was not supported by the pleadings or evidence on record. In support of his submission the learned counsel for the plaintiff relied upon a decision of the Supreme Court in Panchugopal Barua and others Vs. Umesh Chandra Goswami and others, .

10. Before dealing with the rival submissions made by the learned counsel for the parties, it is clear that the services of the plaintiff were removed w.e.f. 11.1.1981 by an order of the Disciplinary Authority dated 10.11.1981 under Rule 47 of the Rules. Rule 47 of the Railway Protection Force Rules, 1959 reads as under :

"Special procedure in certain case. Notwithstanding anything contained in Rules 44, 45 and 46, where a penalty is imposed on a member of the Force (a) on the ground of conduct which has led to his conviction on a criminal charge, or (b) where the disciplinary authority is satisfied for reasons to be recorded in writing, that it is not reasonably practicable to follow the procedure prescribed in the said rules, the Disciplinary Authority may consider the circumstances of the case and pass such orders thereon as it deems fit."

11. A perusal of Rule 47 of the Rules indicates that a major penalty can be imposed on a member of the Force where he has been convicted on a criminal charge or where the disciplinary authority is satisfied for reasons to be recorded in writing, that it was not reasonably practicable to follow the procedure prescribed in the said rules.

12. In the present case, admittedly, the plaintiffs services had not been removed on account of his conviction in the criminal proceeding inasmuch as the order of removal was passed on 10.11.1981, whereas the plaintiff was convicted much later. Consequently, the appellant was removed from the service by invoking clause (b) of Rule 47 of the Rules, which stipulated that the enquiry could be dispensed with, if the Disciplinary Authority was satisfied for reasons to be recorded in writing that it was not reasonable or practicable to follow the procedure prescribed in Rules 44, 45 and 46 of the Rules. Rules 45, 46 and 47 of the Rules contemplates the procedure for imposing a major penalty and provides

that a penalty could only be imposed after holding an enquiry in the manner prescribed under the Rules. In the present case, no enquiry was held nor any charge-sheet was served inasmuch as the Disciplinary Authority dispensed with the enquiry under Rule 47. From a perusal of order of removal dated 10.11.1981 and from the order sheet maintained by the disciplinary authority, it is clear that no reasons for dispensing with the enquiry had been indicated as to why it was not reasonably practicable to hold an enquiry. In *Workmen of Hindustan Steel Ltd. AIR 1975 SC 251*, the Supreme Court held that if the reasons for dispensing with the enquiry, which is a pre-requisite for exercise of the power had not been recorded, such exercise of power was bad and without jurisdiction. The Supreme Court held that it was obligatory for the Disciplinary Authority to give sufficient reasons for the satisfaction of the authority that it was not reasonably practicable to hold such an enquiry. Thus, non-compliance of the mandatory provision of the Rule 47 vitiates the order of removal dated 10.1.1981 being violative of the principles of natural justice.

13. Coming back to the question as to whether the original order of removal having merged with the appellate and revisional order, whether It was open to the plaintiff to challenge the original order of removal, the learned counsel for the plaintiff-respondents contended that the defendant had never stated In his written statement nor pleaded this point before the trial court or before the appellate court and therefore, the defendant-appellant could not be permitted to raise a new issue or to set up a new case, which was not supported by any pleading or evidence on record.

14. Generally, a party cannot be permitted to set up a new case in a second appeal or raise a new issue. However, the question as to whether the original order of removal could be challenged in a civil suit when the same had merged with the appellate or revisional order is not only a jurisdictional issue, but also involves a substantial question of law. In fact, it is a pure question of law, which requires no evidence. This Court, while admitting the second appeal had framed this issue as a substantial question of law. Thus, the submission of the learned counsel for the plaintiff- opposite party has no force and the defendants are permitted to argue on this issue.

15. Admittedly, the plaintiff was removed from the service by an order dated 10.11.1981, against which, he had filed an appeal, which was also dismissed and thereafter, he had filed a review petition, which was also rejected. The doctrine of merger is fully applicable in the present case and the original order of removal has merged with the appellate order and thereafter with the revisional order. In *S.S. Rathore Vs. State of Madhya Pradesh*, , the Supreme Court held that the order of dismissal merges with the appellate order and it is the appellate order, which subsisted and became operative in law and was capable of enforcement. The said judgment was again followed in *Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another*, .

16. In *Kunhayammed and Others Vs. State of Kerala and Another*, , the Supreme

Court held :

"Where an appeal or revision is provided against an order passed by a Court, Tribunal or any other authority before the superior forum and such superior forum modifies reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law."

17. In *Somnath Sahu Vs. The State of Orissa and Others*, , the Supreme Court held that the original order of dismissal having merged with the appellate order, in which case the appellate order alone subsisted and was operative in law and was capable of enforcement. The original decision no longer subsisted as it had merged in the appellate order and unless it is established that the appellate decision was defective in law, the person would not be entitled to the grant of any relief.

18. From the aforesaid decision of the Supreme Court, it is clear that once the original order merged with the appellate order, the original order no longer subsisted and the appellate order became enforceable, which became operative and was capable of enforcement.

19. In the present case, the plaintiff had only challenged the original order dated 10.11.1981 removing him from the service, and had not challenged the appellate or the revisional order. Since the original order dated 10.11.1981 had merged with the appellate order, it was no longer open to the plaintiff to challenge the original order dated 10.11.1981 without challenging the appellate order and the revisional order. Since the plaintiff has not challenged the appellate and the revisional order, the suit was not maintainable and the plaintiff was not entitled to any relief.

20. In view of the aforesaid, the Second Appeal is allowed, and the judgment of the lower appellate court dated 26.8.1987 is set aside and the suit of the plaintiff is dismissed. In the circumstances of the case, there shall be no order as to cost.