
(1997) 05 AHC CK 0041

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 2462 of 1997

Zainul Abdin

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 29-05-1997

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)
Evidence Act, 1872 — Section 65, 66, 74
Penal Code, 1860 (IPC) — Section 279, 304A, 429
Uttar Pradesh State Road Transport Corporation Act, 1950 — Section 5

Citation : (1997) AWC 1914 : (1997) 3 UPLBEC 1922

Hon'ble Judges : R.R.K. Trivedi, J

Bench : Single Bench

Advocate : D. Narain and S.C. Budhwar, for the Appellant;

Final Decision : Allowed

Judgement

R.R.K. Trivedi, J.—Facts giving rise to this writ petition are that petitioner Zainul Abdin was serving as confirmed Driver in Uttar Pradesh Government Roadways at Jaunpur Depot. While petitioner was driving passenger bus No. U P.C 7394 on 18th May, 1962 at about 11.00 A.M. it met with an accident with bullock cart In village Chandpur, P S Rohania in district Varanasi causing death of bullock and a person. For causing this accident petitioner was challaned under Sections 279, 429, 304A I.P.C. and was prosecuted. The Trial Magistrate convicted and sentenced petitioner for six months R.I. which was maintained in appeal and also in revision by this Court. Petitioner was sent to serve out sentence and after serving sentence, petitioner was released from jail on 1st September, 1964. It was the case of petitioner that he submitted joining report on 2nd September, 1964 but he was not permitted to join and ultimately he filed original Suit No. 201 of 1969 in the court of City Munsif, Jaunpur claiming relief of declaration that he was still continuing in service and is entitled to get all benefits of salary and allowances etc. A mandatory injunction was also claimed to hand over charge of the post treating him in service This suit was contested by defendants on various

pleas including that conviction being upheld up to the High Court. The plaintiff was ordered to be terminated from service on 18th April, 1964 and petitioner is not entitled for any relief; that the suit is time barred and it is bad for non-joinder of U.P. State Road Transport Corporation.

2. The suit of petitioner was dismissed by learned Munsif, Jaunpur by judgment and decree dated 4-2-1975. The findings recorded in the suit were that the petitioner was terminated from service on 18th March, 1964, the order of termination was legal and valid and did not suffer from legal or constitutional infirmity. The suit filed was held to be within time. It was further held that as U.P. State Road Transport Corporation, here-in-after referred to as "Corporation", had taken over from U.P. State Government Roadways and thus became employer of the plaintiff ; in absence of Corporation he is not entitled for any relief. Against the decree of the trial court, plaintiff filed Civil Appeal No 35 of 1975 which was pending. In the mean time U. P. Public Services Tribunal, here-in-after referred to as "Tribunal", was constituted by the State of Uttar Pradesh and the appeal filed by petitioner was referred to the Tribunal for hearing, The Tribunal by order dated 26th December, 1978 dismissed the reference of petitioner, aggrieved by which he has approached this Court under Article 226 of the Constitution.

3. I have heard Sri S.C. Budhwar, learned counsel appearing for petitioner and learned standing counsel for the State of Uttar Pradesh and Sri Samir Sharma for Corporation.

4. Sri S.C. Budhwar has assailed the order of the trial court and that of the Tribunal on the following grounds :-

5. The first submission is that the order of dismissal removal or reduction in rank under Clause (a) of Second proviso to Article 311(2) of the Constitution of India should be passed showing application of mind to the nature and gravity of conduct which led to the conviction and involvement in criminal charge. In the present case as alleged order dated 18th March, 1964 was not brought on record. The respondents failed to prove that the order was passed in accordance with law.

6. The second submission is that there is no evidence on record that the alleged order of termination was actually served on the petitioner and without service of the order the termination could not take effect.

7. The third submission is that the Corporation was constituted on 1st June, 1972 u/s 5 of the Road Transport Corporation Act, 1950. Undisputedly the petitioner was a Government Servant. The alleged order of termination was passed on 18th March, 1964 i.e. before Corporation was constituted under State Road Transport Corporation Act. The erstwhile Government Servants serving in U. P. State Government Roadways continued to be on deputation until U. P. State Roadways Organisation (Abolition of Posts and Absorption of Employees) Rules, 1982, here-in-after referred to as "Rules", came in force. The petitioner attained the age of superannuation in the year 1979, Thus the view taken by the trial court as well

as by the Tribunal that the relief could not be granted to petitioner as Corporation was not made party in the suit was misconceived and suffers from serious error of law. Petitioner has been illegally denied the relief.

8. Lastly it has been submitted that the petitioner was convicted and sentenced for period of 6 months R.I. for causing accident, thus the criminal charge against petitioner did not involve any moral turpitude. No mala fides were involved and in the circumstances, the punishment of removal from service was not commensurate to the criminal charge which led to his conviction. The accidents are normally caused for the reasons beyond the control of the driver of the vehicle.

9. In support of his submissions, learned counsel for the petitioner has placed reliance on following cases :

(1) Bachhittar Singh Vs. The State of Punjab, .

(2) U.P. State Road Transport Corporation through its General Manager v. State of U. P. through Secretary, Transport 1981 AWC 481 (FB).

(3) Union of India and Another Vs. Tulsiram Patel and Others, .

10. Sri Samir Sharma, on the other hand submitted that the petitioner was not employee of Corporation and there was no relationship of master and servant nor the Corporation, in any manner, is liable for the relief claimed by petitioner, There was no privity of contract. Learned counsel has placed reliance on following cases :

(1) Jagdish Prasad Gupta and Ors. v. State of Uttar Pradesh and Ors. 1980 All LR 81 (DB),

(2) Surendra Pal Singh v. State of U.P. and Anr. 1988 (56) FLR 463 (DB).

(3) Judgment dated 27th May, 1989 in Civil Misc. Writ Petition No. 3673 of 1982, Roadways Ministerial Staff Association and Anr. v. State of U.P. and Anr.,

(4) Judgment dated 16th May, 1990, in Civil Misc. Writ Petition No. 12818 of 1987, U.P. State Road Transport Corporation through the Regional Manager, Varanasi v. The State of U.P. and Ors.

11. Learned standing counsel submitted that the petitioner was terminated from service on 18th March, 1964 in accordance with law for serious misconduct which led to his conviction on a criminal charge The fact, that such order was passed, was fully established by leading secondary evidence as the original order was not traceable on record It has been further submitted that on account of the misconduct of the petitioner a bullock and a person lost life and thus it was not in public interest to keep him in service. The petitioner was fully aware of the order passed against him as found by the learned Munsif while recording the finding on issue No. 2. In the facts and circumstances of the case, petitioner is not entitled for any relief

12. I have thoroughly considered the submissions of the learned counsel for the parties. On admitted facts that the petitioner was a confirmed Driver of erstwhile U. P. Government Roadways since 1950 and the order of termination was passed against him on 18th March, 1964, i. e. much before the Corporation came in existence, in my opinion, the view taken by the trial court as well as the Tribunal that the petitioner could not be granted relief as Corporation was not made party in the suit was erroneous in law. The legal position in this regard is no more res-integra as this Court has already expressed the view that the employees in U P. Government Roadways serving in Corporation were on deputation up to 1982 and they continued to be Government servants until they were absorbed under the Rules of 1982. In the present case even suit was filed in 1969 i.e. before the Corporation could come in existence. Thus the finding of the trial court on issue No. 9 and the view taken by Tribunal are erroneous in law and if petitioner is found entitled for relief, it cannot be denied on the ground that the Corporation was not party in suit, In view of opinion expressed by Division Bench in case of Jagdish Prasad Gupta (supra) and by Full Bench in U.P. State Road Transport Corporation through its General Manager (supra) there remains no doubt about the legal position expressed above.

13. The other important questions for determination in the present case are as to whether the illegal order dated 18th March, 1964 removing petitioner from service was actually passed and it was served on him and lastly whether the order was legal and valid. Before the trial Court respondents examined Mohd. Zaffar, Asstt. Regional Manager who passed the order dated 18th March, 1964. The copy of his statement has been filed as Annexure-6 to the writ petition. This statement was recorded on 19th August, 1974. In the statement, he has claimed that he passed the order dated 18th March, 1964 against the petitioner as officiating Assistant General Manager. In cross-examination he has said that he does not remember where he was posted when accident took place. From Senior Station Incharge he was promoted as T. S. (Traffic Superintendent), Varanasi on 28th January, 1962 and in 9th month of the year he was officiating as A.G.M The petitioner was confirmed government employee and he could be removed from service only by the appointing authority. In 1964 Mohd. Zaffar was not even Assistant Regional Manager, How and in what circumstances he could officiate as Assistant General Manager is not clear from the record. It is admitted fact that he was posted at Varanasi while petitioner was posted in Jaunpur. This witness also admitted that the copies of the order passed by him were sent to Account Office, A. G. M. Office, G. M. Office and O, P. Office. If the copies of the order of removal were required to be sent to various other Sections and departments of U. P. State Govt. Roadways, it was not difficult for respondents to obtain copy of the order from such departments for being produced before the court However no such effort was made. Provisions for adducing secondary evidence are contained in Section 65 of the Indian Evidence Act, 1872. Secondary evidence are contained in Section 65 of the Indian Evidence Act 1872. Secondary evidence may be given only in certain conditions. Section 65 of the Act is being

reproduced below ;

"65. Cases in which secondary evidence relating to documents may be given- Secondary evidence may be given of the existence, condition or contents of a document in the following cases :

- (a) when the original is shown or appears to be in the possession or power- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person out of reach of, or not subject to, the person of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in Section 66, such person does not produce it;
- (b) when the existence condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest ;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time ;
- (d) when the original is of such a nature as not to be easily movable ;
- (e) when the original is a public document within the meaning of Section 74 ;
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in (India), to be given in evidence.
- (g) when the originals consist of numerous accounts of other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b) the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

14. From perusal of Section 65, it is clear that as the respondents could procure the copy of the order from other departments under the process of the Court, they were not entitled to adduce oral evidence as secondary evidence to prove existence, condition or contents of the documents dated 18th March, 1964. The trial court as well as the Tribunal illegally accepted oral evidence of DW 1 as

substitute of the original document. From the statement of DW 1 it has been fully established that the copies of the order were available in other departments and if copies prepared alongwith original document could be procured, the secondary evidence could not be adduced. There is also no evidence an record about service of the alleged order on petitioner. In the month of March 6, 1964 he was already lodged In jail for serving out the sentence. It could net be disputed that the order dated 18th March, 1964 was passed after revision of petitioner was dismissed by this Court on 26th February, 1964. Thus the service of the order could only be done through the jail authority. In these circumstances, it was not very difficult to prove the service of the order. However no efforts has been made by respondents to prove the service of the order on petitioner, DW 1 Mohammad Zaffar has only said the order was served by Conductor and the entries were made in the despatch register. However the despatch register could also not been traced. Learned Munsif draw inference of knowledge of the order of removal from service on basis of the letter Ex. 9 of the petitioner given to General Manager on 5-5-1967 wherein he mentioned that his services were terminated on dismissal of his appeal from High Court In my opinion, on basis of this letter it was difficult to draw any inference that the alleged order was served on petitioner. The petitioner was claiming for arrears of salary. The order under Clause (a) of the Second proviso of Article 311(2) of the Constitution is a drastic order and is passed against the employees without affording any opportunity of hearing. The existence, condition and contents of such order required strict proof before the judicial court for judicial security. In my opinion, from the evidence and material or record the respondents failed to prove existence and contents of this order. As the order was not on record, it could not be ascertained as to whether the order was legal and valid and satisfied the conditions of Clause (a) of Second proviso to Article 311(2) of the Constitution. Under Clause (a) aforesaid competent authority could pass order of dismissal, removal and reduction in rank which naturally could depend on the nature and gravity of the charge The order passed under this Clause is subject to judicial review and the Court can took into whether the order has been passed after application of mind to the entire facts and circumstances of the case. In the present case, before passing order the authority was required to look into from the materials on record as to whether the accident took place on account of the negligence of the petitioner or there were mitigating circumstances for deciding as to which of the three punishments mentioned in Clause (a) could be appropriate against the employee Such an exercise was necessary in the interest of justice, however, in this case, nothing was proved before the trial court or before the Tribunal to show application of mind by the competent authority to this important aspect of the case. The Tribunal miserably failed to have the correct approach on those important legal question.

15. Normally the matter could have been sent to the Tribunal for deciding it afresh in the light of the observations made above However as petitioner has already retired from service arid this litigation is pending since 1969, in my

opinion, the ends of justice shall be better served if this case is finally decided by this Court under Article 226 of the Constitution.

16. As the respondents have failed to prove by any legal evidence that any order of dismissal or removal was passed against petitioner under Clause (a) of the second proviso to Article 311(2) of the Constitution by the competent authority in accordance with law, the petitioner shall be deemed to have been continued in service except for the period during which he was serving out the sentence. During the period he was serving sentence, in law he shall be deemed to be under suspension. The question is now what relief should be granted to petitioner in the present facts and circumstances. Petitioner has already attained the age of superannuation, hence the relief of his reinstatement is out of question. He can only be awarded arrears of salary. Petitioner was convicted and sentenced for a criminal charge of causing accident which involved loss of human life. The suit was filed in 1969 though the petitioner was released from jail on 1st September, 1964. Taking into consideration all these facts and circumstances, in my opinion, petitioner should be awarded 25 per cent of the arrears of salary for the period till he attained the age of superannuation. Hon'ble Supreme Court in case of C.S. Joshi Vs. Indian Institute of Technology, Kanpur and another, has approved grant of 25 per cent of the salary in similar circumstances.

17. For the reasons stated above, this writ petition is allowed. The judgment and order dated 4-2-1975 passed by the trial Court and the award of the Tribunal dated 26th December, 1978 are quashed. The petitioner shall be entitled for the 25 per cent of his salary till the date of his superannuation (except for the period of six months during which he was serving sentence). After the date of superannuation the petitioner will be entitled for the full retirement benefits as if he continued throughout in service. No costs.