Gujarat Electricity Board and Another

Vs

Atmaram Sungomal Poshani

Civil Appeal No. 3561 of 1986

(K. N. Singh, E. S. Vankataramiah JJ)

31.03.1989

JUDGMENT

SINGH, J. –

1. This appeal is directed against the judgment and order of the High Court of Gujarat dated February 28, 1986 allowing the respondent's writ petition and quashing order of discharge from service and directing his reinstatement in service.

2. The respondent joined service as technical assistant with the Gujarat State Electricity Board (hereinafter referred to as 'the Board'). He was promoted to the post of Deputy Engineer. While he was posted at Surat as Deputy Engineer he was transferred to Ukai sub-division under the order of the Superintending Engineer dated March 29, 1974. Pursuant to the order of transfer he was relieved from his duties at Surat on March 30, 1974 to enable him to join to Ukai. He made representation to the Additional Chief Engineer for canceling his transfer order on the ground that his mother aged 70 years was ailing and it would cause great inconvenience to him if he was required to join at Ukai. His representation was rejected and he was directed to join at Ukai but he did not do so instead he filed a civil suit at Baroda challenging validity of the order of transfer. Meanwhile, the Chief Engineer by his order dated May 27, 1974 discharged the respondent from service with effect from March 31, 1974 in accordance with Service Regulation 113. The respondent challenged the validity of the order of his discharge from service by means of a writ petition under Article 226 of the Constitution before the High Court of Gujarat. A learned Single Judge of the High Court quashed the order of termination on the findings that the order of discharge was issued in violation of the basic principles of natural justice as no opportunity was afforded to the respondent before discharging him from service under Regulation 113. The learned Single Judge granted a declaration in respondent's favour holding the order void and illegal but having regard to recalcitrant attitude of the appellant and his continued conduct of disobedience of the orders of his superior authorities, he refused to grant consequential reliefs regarding reinstatement or payment of back wages. The respondent as well as the appellant-Board, both preferred Letters Patent Appeals against the order of learned Single Judge. A Division Bench of the High Court dismissed the appeal preferred by the appellants but it allowed the respondent's appeal. The division Bench upheld the order of the learned Single Judge holding the order of discharge illegal and void but it set aside the order of the learned Single Judge refusing to grant consequential relief, instead it directed the appellants to reinstate the respondent, and to treat him in service without any break in service and to grant him benefits of increments, seniority, and promotion to which he may be entitled under the rules. The bench, however, did not grant full back wages to the respondent instead it directed the Board to pay him 50 per cent of back wages. Aggrieved, the appellant has preferred the instant appeal after special leave of this Court.

3. This appeal camp up for hearing before us on January 28, 1988 and that day Sri B. K. Mehta, advocate appearing for the appellants and Sri Vimal Dave, advocate, appearing for the respondent were fully heard. After hearing learned counsel for the parties we were satisfied that the learned Single Judge as well as the Division Bench both had committed error in allowing the writ petition and granting relief to the respondent. We expressed our view in the court and suggested to Mr. Vimal Dave, counsel for the respondent, that if he agreed the original writ petition of the respondent could be dismissed without directing him to refund the amount which he had already been paid by the appellants in pursuance to the order of the High Court and of this Court as during the pendency of the appeal, the appellants were directed by means of interim order of this Court to continue to pay salary to the respondent which was being paid to him regularly. The hearing was adjourned to enable Sri Vimal Dave, to obtain instructions from the respondent. The appeal came up for hearing before us on February 16, 1988 when another counsel appeared to argue the appeal on behalf of the respondent on merits. We refused to here the counsel as we had already completed hearing. Thereupon, the respondent himself appeared in person and sought permission to make his submission personally. We fused to accede to his request as oral hearing had already been completed and the matter had been adjourned only to enable the respondent's counsel to obtain instructions. However, in the interest of justice we permitted the respondent to file written submissions, if any, in support of his case. Thereafter, the case listed several times but no written submission were filed, instead the respondent adopted an unusual course by sending an application by post expressing his no confidence in us a prayer to transfer the case to some other bench. Since this was unusual, uncalled for and unjustified request we ignored the same and reserved the order. We are constrained to note that instead of utilising the opportunity granted to him for filing written submissions the respondent has misused adjournments for the purposes of raising frivolous objections for getting the case transferred to some other bench. No party is entitled to get a case transferred from one bench to the other, unless the bench is biased or there are some reasonable grounds for the same, but not right to get a case transferred to any other bench can legitimately be claimed merely because the judges express opinion on merits of the case on the conclusion of hearing. In the instant case on the conclusion of the oral hearing we had expressed our opinion on January 28, 1988 in the open court, that we were inclined to allow the appeal and set aside the order of the High Court and dismiss the writ petition but taking a sympathetic view are requested Sri Vimal Dave, learned counsel appearing for the respondent to obtain instructions as aforesaid. The opportunity granted to the respondent has, however, been misused by raising mischievous and frivolous objections instead of filing written submissions. The respondent's prayer is accordingly rejected and since oral hearing has already been completed, and inspite of several adjournments respondent failed to appeal before the court or to file the written submission we proceed to decide the case on merits.

4. Transfer of a government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No government servant or employee of Public Undertaking has legal for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to other. If he fails to proceed on transfer in compliance with the transfer order, he

would expose himself to disciplinary action under the relevant rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other.

5. There is no dispute that the respondent was holding a transferable post and under the conditions of service applicable to him he was liable to be transferred and posted at any place within the State of Gujarat. The respondent had not legal or statutory right to instant for being posted at one particular place. In fact, during the tenure of his service in the Board the respondent had been transferred from one place to another place several times. In March 1974 he was transferred from Surat to Ukai. The distance between the two places as was stated before us during the hearing of the case is less than 50 kms. He was relieved from his duties at Surat on March 30, 1974 but he did not join to Ukai till the impugned order of the discharge was issued on May 27, 1974. The Chief Engineer who discharged the respondent's service exercised his power under Service Regulation 113, which runs as under :

> 113. The continued absence from duty or overstay, in spite of warning, to return to duty shall render the employee liable to summarily discharge from service without the necessity of proceedings under the Gujarat Electricity Board, Conduct, Discipline and Appeal Procedure.

The above regulation provides that if an employee of the Gujarat Electricity Board continues to remain absent from duty or overstays the period of sanctioned leave and in spite of warning, he fails to return to duty, he renders himself liable to be discharged summarily from service without complying with the procedure prescribed for taking disciplinary action, under the Gujarat Electricity Board, Conduct, Discipline and Appeal Procedure. Regulation 113 confers wide powers on the authorities to summarily discharge an employee from service, if he continues to be absent from duty in an unauthorised manner and refuses to join his duty even after warning. Under the disciplinary rules detailed procedure is required to be followed for removing an employee from service but Regulation 113 provides for summary discharge from service. Before this power is exercised, two conditions must be satisfied; Firstly, the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave, and, secondly, he failed to join his duty even after a warning. The object and purpose of giving warning is to remind the delinquent employee that if he continues to be absent from duty he would be liable to action under Regulation 113 and to afford him an opportunity to make amends by joining his duty. If even thereafter he fails to join duty, his services are liable to be terminated by an order of discharge. It is noteworthy that the validity of Regulation 113 was not challenged before the High Court and the parties proceeded on the assumption that Regulation 113 was valid and applicable to the respondent's service. The Chief Engineer discharged the respondent from service as he had continued to remain absent from duty w.e.f. March 30, 1974 to May 27, 1974. The Division Bench of the High Court held that no warning as contemplated by Service Regulation 113 had been issued to the respondent nor he had been afforded any opportunity of showing cause before the impugned order of discharge was passed and consequently, the order of discharge was null and void being contrary to Service Regulation 113 itself. On perusal of the material on record were are of the opinion that the view taken by the High Court is not sustainable as there is sufficient material on record which shows that warning had been issued to the respondent before the order of discharge was issued.

6. In determining the question whether any warning was given to the respondent it is necessary to refer to the sequence of event and the correspondence which ensued between the appellants and the respondents. On March 29, 1974 the Superintending Engineer of the Board issued the order,

transferring the respondent from Surat to Ukai, on March 30, 1974 the respondent was relieved from Surat and directed to join his duty at Ukai, but the respondent did not join his duty at the new place of posting. Instead he made a representation to the Additional Chief Engineer on April 8, 1974 after the transfer order. The transfer order was not stayed and as the respondent did not join his duties, he continued to be absent without sanction of any leave. In this situation the Superintending Engineer by his letter dated April 18, 1974 directed the respondent to show cause as to why action should not be taken against him for disobeying the order of transfer and also for unauthorised absence from duty in breach of Service Regulation 113. The letter is as under :

> # Gujarat Electricity Board O & M Division Nana Varch Road, Surat Dated April 18, 1974ToShri A. S. PohaniJunior Engineer, Ukai37, Gurunagar SocietyNear Jakat Naka, Surat-3 Sub : Transfer from Surat to UkaiYou have been relieved on March 30, 1974 A.N. on accountof your transfer from Surat to Ukai, but you have not reportedto Ukai till today and remained on unauthorised absence onrelief, which is breach of S.R. Nos. 112 and 113.Please submit your explanation as why action should not betaken against you for disobeying order of superior and breach ofS.R. Nos. 112 and 113 within 7 days from receipt of this letter. Sd/- Executive Engineer (O & M) SuratCopy f.w.c.s. to Superintending Engineer, GEB, Utran##

There is no dispute that the respondent received the aforesaid letter as he sent to the Superintending Engineer on April 20, 1974, a copy of which was annexed as Annexure 'J' by the petitioner to his petition before the High Court. By that letter respondent stated that he was waiting for the decision of his representation made for reconsideration of his transfer from Surat to Ukai, and therefor, the question of his remaining on unauthorised leave was misconceived. Since the respondent had not obtained any sanction leave for his absence his absence from duty was unauthorised. No government servant or employee of any public undertaking has a right to be absent from duty without sanction of leave, merely on account of pendency of representation against the order of transfer. Since the respondent continued to be absent from duty the Superintending Engineer by a registered post acknowledgment due letter dated April 24, 1974 informed the respondent that his request to postpone his transfer was rejected and he was directed to join his duty at Ukai and on his failure to do so disciplinary action would be taken against him. The Establishment Officer (P) of the Board, also informed the respondent by his letter dated May 6, 1974 that his representation against the order of transfer was not accepted and he was directed to obey the order of transfer. A copy of the letter was filed by the petitioner himself as Annexure 'K' to the writ petition in the High Court. But even thereafter, the respondent did not join his duties. Ultimately, the Chief Engineer of the Board took action against the respondent and discharged him from service with effect from March 31, 1974 by his letter dated May 27, 1974. The sequence of events and the correspondence which ensued between the officers of the Board and the respondent clearly show that the respondent disobeyed the order or transfer and he remained absent from duty in an unauthorised manner without obtaining sanction of leave. The aforesaid documents leave no room for any doubt that the respondent was reminded of his failure to join his duties to Ukai and he was further reminded that his unauthorised absence had exposed him to disciplinary action. In fact, the Superintending Engineer had by his letter dated April 18, 1974 clearly reminded the respondent that his unauthorised absence was in breach of Service Regulation 113 and called upon to show cause why action should not be taken against him but inspite of these letters the respondent failed to join his duties. The Division Bench of the High Court has held that since no warning was issued to the respondent action taken under Service Regulation 113 was not in accordance with law. This finding is wholly misconceived. A warning need not be in any particular form. The object and purpose of the warning as contemplated by the regulation is to remind the delinquent employee that his

continued unauthorised absence from duties was liable to result in discharge of his service. The substance of the Superintending Engineer's letter dated April 18, 1974 which was admittedly served on the respondent, contained warning to the respondent, which fully met the requirement of Regulation 113.

7. Before the High Court a controversy was raised as to whether the registered letter dated April 24, 1974 addressed by the Superintending Engineer to the respondent was received by him or not. The registered cover, containing the letter dated April 24, 1974 was returned back by the postal authorities with an endorsement that the addressee refused to accept the same. The respondent's case was that no such registered letter was tendered to him by the postman nor he ever refused to accept the same. The Division Bench held that letter dated April 24, 1974 which contained a warning had not been served on the respondent and since the Board had failed to raise the question before the learned Single Judge it could not do so in the Letters Patent Appeal. The Division Bench further held that since the letter dated April 24, 1974 was not served on the respondent, there was no material to show that any warning had been issued to the respondent before he was discharged from service. We do not agree with the view taken by the Division Bench. Firstly, even if the letter dated April 24, 1974 was not served on the respondent there is no dispute that the Superintending Engineer's letter dated April 18, 1974 had been served on him. By that letter warning as contemplated by Regulation 113 had been issued to the respondent. Therefore even if the letter dated April 24, 1974 was not served on the respondent the order of discharge as contemplated by Regulation 113 is sustainable in law. But even otherwise, the Division Bench committed error in holding that the Board had raised the question of service of the letter dated April 24, 1974 for the first time before the Division Bench in the Letters Patent Appeal. A perusal of the averments made in paragraphs 17, 18, 23 and 25(2)(ii) of the counter-affidavit filed it reply to the petitioner's writ petition before the learned Single Judge shows that the Board had categorically pleaded that the respondent was informed by letter dated April 24, 1974 that his representation to postpone his transfer was rejected and he should obey the order of transfer. It was further pleaded that the respondent had refused to accept the registered letter and the same had been returned back by the postal authorities with an endorsement that the addressee refused to accept the same. In his rejoinder affidavit the respondent denied the aforesaid allegations and asserted that the letter was not tendered to him and he never refused to accept the registered cover and the postal endorsement was wrong and incorrect. Apart from denying the postal endorsement, the respondent placed no material before the court in support of his pleading. In this view, we are of the opinion that the Division Bench was totally wrong in holding that no opportunity was afforded to the respondent to meet the case set up by the Board that the letter dated April 24, 1974 was served on the respondent. No new plea had been raised by the Board before the Division Bench instead the plea relating to service of the aforesaid letter had already been before the learned Single Judge.

8. There is presumption of service of a letter sent under registered cover, if the same is returned back with a postal endorsement that the addressee refused to accept the same. No doubt the presumption is rebuttable and it is open to the party concerned to place evidence before the court to rebut the presumption by showing that the address mentioned on the cover was incorrect or that the postal authorities never tendered the registered letter to him or that there was no occasion for him to refuse the same. The burden to rebut the presumption lies on the party, challenging the factum of service. In the instant case the respondent failed to discharge this burden as he failed to place material before the court to show that the endorsement made by the postal authorities was wrong and incorrect. Mere denial made by the respondent in the circumstances of the case was not sufficient to rebut the presumption relating to service of the registered cover. We are, therefore, of the opinion that the letter dated April 24, 1974 was served on the respondent and he refused to

accept the same. Consequently, the service was complete and the view taken by the High Court is incorrect.

9. In view of the above discussion, we therefore hold that the respondent's failure to join his duties at Ukai in unauthorised absence and his failure to join his duties in spite of the repeated reminders and letter issued to him constituted sufficient valid ground for taking action under Regulation 113. We further hold that before issuing the order of discharge the respondent was not only warned but he was also afforded an opportunity to explain as to why disciplinary action should not be taken against him. The respondent acted in an irresponsible manner in not complying with the order of transfer which led to his discharge from service in accordance with the service Regulation 113. The learned Single Judge as well as the Division Bench both erred in law setting aside the order of discharge. We, accordingly, allow the appeal, set aside the order of the Single Judge as well as Division Bench and dismiss the respondent's petition. There would be no order as to costs.

10. The respondent has been paid a sum of Rs. 1,04,170 towards salary under the interim orders of this Court. Now, since the order of discharge is held to be valid the amount paid to the respondent is liable to be recovered from him, but having regard to the facts and circumstances of the case and the hardship which would be caused to the respondent, we direct the appellant not to recover the amount already paid to the respondent.

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