

Mohd. Iqbal Khanday

Vs

Abdul Majid Rather

Civil Appeal Nos. 2297-98 of 1994

(S. Mohan, M. N. Venkatachaliah JJ)

06.04.1994.

### JUDGMENT

S. MOHAN, J. –

1. Special leave granted in both SLPs.
2. Both these matters can be dealt with under common judgment. The short facts are as under.
3. The respondent was appointed as Lecturer in the Faculty of Medicine, Medical College, Srinagar, under Order No. 197-ME of 1981. He took up foreign assignment with Subya General Hospital at Saudi Arabia. He was in Saudi Arabia for a period of 2 years and 10 months. The said period was treated as on deputation without pay and allowances. It was directed that he will be entitled to count the said deputation towards increments and other service benefits. It was made clear that this period of deputation on foreign assignment could not be counted as against teaching experience.
4. By Government Order No. 134-HME dated 25-2-1986, he was promoted as Assistant Professor on ad hoc basis. Thereafter his services as such came to be regularised on the basis of the recommendation of the Public Service Commission as per Government Order No. 304-HME dated 7-4-1989. The respondent was confirmed on the post of Assistant Professor with retrospective effect from 25-1-1987.
5. He filed Writ Petition No. 2452 of 1992 before the High Court of Jammu & Kashmir at Srinagar inter alia seeking 'ad hoc' promotion to the post of Associate Professor with effect from 14-3-1989. It was urged in the writ petition that promotions granted to various other persons were arbitrary and he had been denied such a promotion despite having requisite experience. The further contention was that it was wrong on the part of the Government in not counting period of foreign assignment as against his teaching experience.
6. On 21-9-1992, the High Court issued notice on the writ petition. It also passed an interim order directing the State Government and the appellant herein to grant ad hoc promotion to the respondent to the post of Associate Professor. In March 1993 for non-implementing this order, contempt proceedings were initiated by the respondent. On 8-3-1993 the High Court issued notice on the contempt petition and called upon the appellant to implement the order dated 1-9-1992. When the contempt proceedings came up for hearing on 1-9-1993, the learned Judge passed an order directing issue of non-bailable warrants and framed "rule" in the said contempt petition. The learned Judge also directed the Government Advocate - Additional Advocate-General, representing the appellant, should not appear on behalf of the appellant in the said contempt petition to defend him and on the

contrary should assist the court.

7. The appellant filed this counter in the contempt proceedings. Besides, a detailed counter was also filed in the writ petition in which it was stated that the claim of the respondent for promotion was misconceived since such a promotion to the post of Associate Professor under the relevant rule was required to be made by the Public Service Commissioner or by Departmental Promotion Committee. It was further urged that he did not possess the requisite qualifications/experience eligible for promotion. More than above this, the post of Associate Professor was a selection post. Mere gaining of experience was not sufficient to entitle the respondent to claim promotion.

8. On 13-9-1993, the appellant was personally present in the court. The learned Judge declined to accept the unqualified apology tendered by the appellant till the order dated 21-9-1992 was implemented and he appellant purged himself of contempt. The contempt proceedings were adjourned to 27-9-1993 and it was directed that the appellant be present in the court on the said date. Aggrieved by this order, SLP No. 15573 of 1993 has come to be preferred.

9. Against the order dated 1-9-1993 referred to above, SLP No. 15563 of 1993 has come to be preferred.

10. It is urged on behalf of the appellants that in the facts and circumstances of the case, the interim order could not have been passed because practically it amounts to allowing the writ petition without hearing the appellant. Therefore, it is a wrong order. Even assuming otherwise, it is incapable of compliance and the implementation will be against the relevant rules. Under such rules, the respondent is not possessed of the requisite experience. It is not the appellant who could accord promotion since it has to be done by the Public Service Commission or the Departmental Promotion Committee. Therefore, the implementation is impossible. It was under these circumstances, the appellant appeared and tendered his apology.

11. There is no justification for the court to direct the counsel for the appellant, namely, Additional Advocate-General not to appear for the appellant and that the court should assist the court. Thus it is prayed that the impugned order may be set aside.

12. In opposition to this, the learned counsel for the respondent would urge the rightness or wrongness of the order cannot be urged in the contempt proceedings. Properly speaking, the order to accord promotion dated 21-9-1992 though interim in nature, ought to have been obeyed. Not only that was not obeyed but the court was necessitated to issue non-bailable warrants because of the defiant attitude adopted by the appellant. Such an attitude could hardly be commended. Therefore, the High Court was fully justified in not accepting the apology unless the appellant purged himself for contempt. Equally the direction to the Additional Advocate-General not to appear on behalf of the appellant is fully warranted. No interference is called for.

13. Having regard to the above, we have got to balance the dignity of the court in requiring obedience to its orders as against the performance of an act contrary to rules compelled by the court's direction.

14. The law of contempt is based on sound public policy by punishing any conduct which shakes the public confidence in the administration of justice. The order dated 21-9-1992 while directing notice also required the appellant to accord promotion to the respondent as Associate Professor. It requires to be noticed here that is the main prayer in the writ petition itself. In such circumstances, the

correctness of such an interim order is open to serious doubt. For a moment, it is not to be understood that the court has no power to pass such an order but the question is whether while granting such interim reliefs the discretion of the court has been correctly exercised? If the writ petition is ultimately dismissed, the respondent would have gained an undue advantage of getting a promotion undeservedly. But we are not on the merits of the interim order.

15. Right or wrong, the order has been passed. Normally speaking, it cannot be gainsaid that the order ought to have been obeyed but it appears that there are insuperable difficulties in implementing the order. First is that the post of Associate Professor, according to the respondent, is a selection post. Secondly, the mere seniority, even if that is assured in favour of the respondent, would not be enough to gain such a promotion. Thirdly, the specific order of the Government was to exclude the period of deputation on foreign assignment from reckoning the duration of the teaching experience of the respondent. Therefore, the respondent did not possess the requisite qualification. Fourthly, such necessary qualifications seem to be mandatory under the rules. That being the position to accord such a promotion, will be violative of the rules. Fifthly, the promotion could be granted only by the Public Service Commission and not by the appellant.

16. From the above, it appears that the appellant was expressing his genuine difficulties with regard to the implementation of the order dated 21-9-1992. In such a situation the insistence of the courts on implementation may not square with realities of the situation and the practicability of implementation of the court's direction. In our considered view, hooking a party to contempt proceedings and enforcing obedience to such orders hardly lends credence to judicial process and authority; more so, in the peculiar facts and circumstances of the case. The court must always be zealous in preserving its authority and dignity but at the time it will be inadvisable to require compliance of an order impossible of compliance at the instance of the person proceeding against for contempt. Practically, what the court by means of the contempt proceedings seeks is an execution which cannot meet with our approval.

17. Equally, there is no justification for directing the Additional Advocate-General not to appear for the appellant but only assist the court in view of what we have expressed above.

18. At the same time, we are constrained to observe that the conduct of the appellant necessitating issue of non-bailable warrant is not in keeping with the responsibility of the office he holds. Greater respect should have been shown to court and if he was aggrieved by the order, he should have taken prompt steps to invoke the appellate procedures. The appellant could not ignore the order and plead the difficulties of implementation at the time contempt proceedings are initiated. It will be proper for the appellant to tender an unconditional apology before the High Court for these lapses.

19. We would request the main writ petition be disposed of on merits since the vital question as to the eligibility of the respondent to be promoted as Associate Professor has to be decided first. Accordingly, the civil appeals are allowed as indicated above. There shall be no order as to costs.

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