

State of A. P. and Another

Vs

Dr. Rahimuddin Kamal

Civil Appeal No. 3340 of 1990

(S. P. Kurdukar, JJ)

07.02.1997

JUDGMENT

S. P. KURDUKAR J.

1. This civil appeal by special leave is filed by the State of Andhra Pradesh and another challenging the legality and correctness of the judgment and order dated 7-8-1984 passed by the Andhra Pradesh Administrative Tribunal in review representation being Miscellaneous Petition No. 322 of 1984 in Representation Petition No. 142 of 1978 filed by the respondent.

2. A few facts relevant for the disposal of this appeal may be briefly summarised as under :

The respondent was appointed on 18-4-1945 as Tehsildar in the Revenue Department of the erstwhile State of Hyderabad. On reorganization of the States on 1-11-1956, the respondent was allotted State of Andhra Pradesh. In the year 1957, he was promoted as Deputy Collector.

3. While serving as Deputy Collector, the respondent applied for and was granted leave from 11-6-1963 to 10-6-1968. While on leave, on 14-11-1964, the respondent sought premature retirement. The Board of Revenue informed the respondent that a government servant in superior service governed by old pension rules had the option to retire from service only after completion of 25 years of qualified service. While sanctioning the last spell of extension of leave from 1-1-1968 to 10-6-1968, the Board of Revenue informed the respondent that he would cease to be a government servant from 11-6-1968 as per Rule 29 of the Hyderabad Civil Service Rules (for short "the Rules") according to which a government servant after five years of continuous absence from duty elsewhere than on foreign service ceases to be a government servant. Despite such communication, the respondent did not join the service on 11-6-1968 but sought permission on 19-6-1968 to serve in a private company started by him and his wife. According to the appellants, the respondent thus had not only violated Rule 29 of the Rules by remaining absent for more than five years but also contravened Rules 10, 11, and 12 of the Andhra Pradesh Civil Services Conduct Rules, 1964. In the meantime, the Government of Andhra Pradesh on 28-8-1968 appointed the Secretary to the Board of Revenue as enquiry officer under Rule 19(2) (a) of the A.P. Civil Services (Classification, Control and Appeals) Rules, 1963. On 24-11-1970, a charge-sheet came to be served on the respondent. The respondent submitted his reply on 28-12-1970 but did not ask for any oral inquiry. On perusal of the reply, the Authority found that the explanation given by the respondent was not satisfactory and, therefore, on 31-3-1972, a show-cause notice was issued to him (respondent) indicating the proposed punishment of removal from service. Vide order dated 23-9-1977, the respondent was removal from service. By another order dated 13-12-1977, the period between 11-6-

1968 to 23-9-1977 was treated as "dies non". It is relevant to mention that till the order of removal from the service was made, the respondent continued to remain absent. In 1978, the respondent filed representation petition against the orders dated 23-9-1977 and 13-12-1977 before the Andhra Pradesh Administrative Tribunal. After hearing the parties, the A.P. Administrative Tribunal vide its order dated 10-6-1984 dismissed the representation petition. The respondent thereafter filed review representation Miscellaneous Petition No. 322 of 1984 before the said Tribunal. The A.P. Administrative Tribunal after hearing the review petitioner and the respondent vide its order dated 7-8-1984 set aside the order of removal of the respondent passed on 23-9-1977 though upheld the order dated 13-12-1977 on the ground that prior to the issue of order dated 23-9-1977, the Andhra Pradesh Vigilance Commission was not consulted by the Government as required by the then existing Rule 4(2) of the A.P. Civil Services (Disciplinary Proceedings Tribunal) Rules.

4. From the record, it is found that the Government of Andhra Pradesh on 31-10-1984 issued GOMs No. 1618 whereby it annulled the orders of the Tribunal dated 7-8-1984 passed in review representation Miscellaneous Petition No. 322 of 1984. This order was issued by the Government of Andhra Pradesh in exercise of its powers under Article 371-D(5) of the Constitution of India. Aggrieved by the order dated 31-10-1984, the respondent filed writ petition in the High Court of Andhra Pradesh and the High Court vide its order dated 12-2-1987 relying upon the decision of this Court in *P. Sambamurthy v. State of A.P.* [(1987) 1 SCC 362 : (1987) 2 ATC 562 : (1987) 1 APLJ 13 (SC)] allowed the writ petition and set aside the order dated 31-10-1984 passed by the Government of Andhra Pradesh. The Government of Andhra Pradesh feeling aggrieved by the order passed by the Andhra Pradesh Administrative Tribunal on 7-8-1984 has filed this appeal challenging the legality and correctness thereof.

5. The Andhra Pradesh Administrative Tribunal after considering to Rule 2(b) of the A.P. Civil Services (Disciplinary Proceedings Tribunal) Rules (for short "DPT Rules") which defines "misconduct" and on reconsideration of Rule 4 opined that the charges levelled against the respondent relate to the misconduct as defined under Rule 2(b) *ibid* and since the Government of Andhra Pradesh under sub-rule (2) of Rule 4, as it then stood, did not consult the Andhra Pradesh Vigilance Commission before passing the order of removal on 23-9-1977, the said order is rendered illegal. However, the Andhra Pradesh Administrative Tribunal did not disturb the order dated 13-12-1977 as regards treating the period between 11-6-1968 to 23-9-1977 as "dies non". The only question, therefore, that falls for our consideration is as to whether Andhra Pradesh Administrative Tribunal was right in setting aside the order of removal of the respondent passed on 23-9-1977 solely on the ground that before passing this order, the Government of Andhra Pradesh did not consult the Vigilance Commission. In order to appreciate the rival contentions, it is necessary to reproduce Rule 4 of DPT Rules which reads as under :

"4. (1) In every case referred to in sub-rule (1) or (2) of Rule 3, on completion of investigation, the anti-corruption department or other departmental authority concerned shall submit a report of the case to the Government.

(2) The Government shall after examining such records and after consulting the Head of Department concerned, if necessary, decide whether the case shall be tried in a court of law or inquired into by the Tribunal or departmental authority. But before taking a decision, the Government shall consult the Andhra Pradesh Vigilance Commission.

(3) If the Government decides that the case shall be inquired into the Tribunal, they

shall send the records relating thereto the Tribunal.

(4) In any case where the Head of the Department is not consulted, he shall be informed of the action that is being taken.

(5) There shall be a Director of Prosecutions and as many Additional Directors of Prosecutions as may be considered necessary to conduct enquiries on behalf of the Government in disciplinary cases before the Tribunal and the accused officer concerned shall be allowed to be represented by counsel. In case where the Director of Prosecutions or any of the Additional Directors of Prosecutions cannot attend to examinations of witnesses on commission, an ad hoc Director of Prosecutions shall be appointed. [As per GOMs No. 109 (Ser. D) 25-2-1969.]"

6. Rule 2(b) of DPT Rules defines "misconduct" as :

"2. (b) 'Misconduct' shall have the same meaning as criminal misconduct under Section 5(1) of the Prevention of Corruption Act, 1947 (Central Act II of 1947) and shall include any attempt to commit any offence referred to in clause (c) or clause (d) of that section and any 'wilful' contravention of the rules made under the proviso to Article 309 of the Constitution of India, to regulate the conduct of persons appointed to public services and post in connection with the affairs of the State'. [GOMs No. 1026, G.A. (Ser-D), dated 16-2-1969.]"

7. Admittedly, the respondent had remained absent from duty for more than five years commencing from 10-6-1968 till the order of removal was made on 23-9-1977. His absence from duty, therefore, would be covered by the definition of misconduct under Rule 2(b) of DPT Rules.

8. The learned counsel for the appellants urged that Rule 4(1) and (2) of DPT Rules have no application in the present case because no vigilance investigation was ever directed by the Government of Andhra Pradesh. In the absence of any such inquiry, the counsel urged that there was no question of consulting the Andhra Pradesh Vigilance Commission. Alternatively, it was submitted that assuming that clause (2) of Rule 4 of DPT Rules applies in the present case yet the same is not mandatory and, therefore, its non-consultation by the Government with the Andhra Pradesh Vigilance Commission would not render the order dated 23-9-1977 illegal. A somewhat similar question fell for consideration before the Constitution Bench of this Court in *State of U.P. v. Manbodhan Lal Srivastava* [1958 SCR 533 : AIR 1957 SC 912 : (1958) 2 LLJ 273]. In this reported decision, a penalty of reduction in rank was made without consulting the Public Service Commission. An argument was raised that under Article 320(3) (c) of the Constitution of India, it was obligatory to consult the Public Service Commission before any adverse order was made against the public servant. This Court while construing the provisions of Articles 311 and 320(3) (c) of the Constitution held that the provisions of Article 320(3) (c) relating to the prior consultation with the Public Service Commission are not mandatory and that non-compliance thereof does not afford cause of action to the respondent (public servant), in a court of law. This Court observed as under :

"An examination of the terms of Article 320 shows that the word 'shall' appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3) (c) are mandatory in terms, the other clauses or sub-clauses of that article will have to be equally held to be mandatory. If they are so

held, any appointments made to the public services of the Union or a State, without observing strictly the terms of these sub-clauses of that article will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word 'shall' in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word 'may' has been used, the statute is only permissive or directly in the sense that non-compliance with those provisions will not render the proceeding invalid."

9. The relevant portion of clause (2) of Rule 4 of DPT Rules reads thus :

"4. (2) ... But before taking a decision, Government shall consult the Andhra Pradesh Vigilance Commission."

10. The phraseology used in Article 320(3) is similar and reads thus :

"The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted."

11. The word "shall appearing in clause (2) of Rule 4 set hereinabove, therefore, in our opinion, is not mandatory and consequently non-consultation with the Andhra Pradesh Vigilance Commission would not render the order of removal of the respondent passed on 23-9-1977 illegal.

12. Mr. H. S. Gururaja Rao, the learned Senior Counsel appearing for the respondent, relied upon the judgment of this Court in *Deokinandan Prasad v. State of Bihar* [(1971) 2 SCC 330 : 1971 Supp SCR 634] to contend that the word "shall" in clause (2) of Rule 4 of the DPT Rules must be construed as mandatory and non-observance thereof would render the order dated 23-9-1977 illegal. After going through the judgment, we are unable to accept the contention raised on behalf of the respondent. He then relied upon another decision of this Court in *Jai Shanker v. State of Rajasthan* [(1966) 1 SCR 825 : AIR 1966 SC 492 : (1966) 2 LLJ 140]. It was a case where Regulation for automatic termination of service on account of overstaying the leave period for more than one month. The question raised before this Court was whether such termination attracts Article 311 and the answer given by this Court is in the affirmative. The facts of this reported decision are quite distinguishable and have no application to the facts of the present case.

13. For the foregoing reasons, we allow the appeal and set aside the order dated 7-8-1984 passed by the Andhra Pradesh Administrative Tribunal. In the circumstances, there will be no order as to costs.