(97)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

HYDERABAD BENCH : AT HYDERABAD

MA 918/93.
in
OA 897/91.

Dt. of Order:1-12-93.

D.V.V.Varma

...Applicant

Vs.

1. The Superintending Engineer, Hyderabad Central Circle, CPWD, Hyderabad.

2. The Chief Engineer, Southern Zone-II, CPWD, Madras.

3. The Director (Engineering), CPWD, Govt. of India, Nirman Bhavan, New Delhi.

...Respondents

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Counsel for the Applicant : Shri P.B.Vijaya Kumar

Counsel for the Respondents : Shri N.R.Devraj, Sr.CGSC

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CORAM:

THE HON'BLE SHRI A.B.GORTHI : MEMBER (A)

THE HON'BLE SHRI T.CHANDRASEKHAR REDDY : MEMBER (J)

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M.A.No.918/93

in

O.A.897/91 Date of Judgement: 1-12-93

JUDGEMENT

(As per Hon'ble Shri T. Chandrasekhara Reddy, Member(J))

M.A.No.918/93 in OA 897/91 is filed to bring the legal representatives of the deceased applicant in OA 897/91 on record and to add them as applicants 2 to 4. (MA 918/93 is since registered by the Registry as per oral orders.) There is a delay of 3 months and 22 days in filing MA 918/93 to implead the legal representatives of the deceased applicant in OA 897/91 as applicants 2 to 4. So MA 722/93 is moved to condone the said delay. After hearing both sides as sufficient cause is made out for the delay in filing the LR petition (MA 918/93), we condone the delay of 3 months and 22 days in filing MA 918/93. Hence, MA 722/93 is allowed.

2. We have heard arguments in MA 918/93.

3. To adjudicate MA 918/93, a few facts have got to be stated. The applicant in OA 897/91 was working as Junior Engineer in Vizag Central Sub Division, Vizag. While so, the applicant was involved in three corruption cases. The applicant was tried by the Special Judge for CBI cases Visakhapatnam.

4. In CC 1/89, the applicant in the OA was tried of the offences under Section 120-B IPC(Criminal conspiracy) 409 IPC(Criminal breach of trust) 467 IPC (Forgery of valuable security) 471 read with 467 IPC (using as genuine forged documents) and also of the offences under section 5(1)(c) read with 5(2) of Prevention of Corruption Act (criminal misconduct in the discharge of official duty).

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The applicant in the OA was found guilty of all of the said offences. For each of the offences, the applicant in the OA was sentenced to suffer various sentences of imprisonment ranging from 3-5 years. Of the offences under section 5(1)(c) read with 5(2) of Prevention of Corruption Act besides sentence of imprisonment, the applicant was also sentenced to pay a fine of Rs.5000/- and in default to suffer simple imprisonment for two years. The sentences of imprisonment imposed on the applicant were ordered to run concurrently.

In another case (C.C 6/89) for possession of assets which were disproportionate to his known sources of income, the applicant was convicted under section 5.(1) (c) read with 5 (2) of Prevention of corruption act, and was sentenced to undergo R.I. for a period of one year and pay a fine of Rs. 1000/- in default to suffer S.I. for a period of six months. This imprisonment was also ordered to run concurrently, with the sentences of imprisonment passed in CC Nos. 1/89 and 4/89.

In the third (C.C) No. 4/89 which was before the Special Judge for CBI cases, Visakhapatnam, the applicant was convicted of the offence under section 5(1)(d) read with Section 5(2) of Prevention of corruption Act and also of the offences u/s 168 & 467 IPC, and was sentenced to undergo R.I. for a period of one year on each count and pay a fine of Rs. 1000/- and in default suffer s.I. for sic months. The sentences of imprisonment were ordered to run concurrently with the sentences of imprisonment passed in CC 1/89 and 6/89. The copies of the Judgements in the above cases were duly served on the respondents. The applicant preferred appeals in all the 3 cases as against the convictions and sentences passed against him in the High Court of A.P.

As the applicant stood convicted in the above 3 cases as aforesaid by the Special Judge for CBI cases, Visakhapatnam, the first respondent passed the order dated .11.12.1990 dismissing the applicant from service as the first respondent came to the opinion that the conduct of the deceased applicant that led to his conviction was such as to render his further retention in ~~the~~ public service undesirable. The ~~deceased~~ applicant preferred an appeal dated 25.1. 1990 to the third respondent as against the order of dismissal dated 11.12.1990 passed as against the applicant by the first respondent. This O.A. was filed on 17.9.91 questioning the said dismissal order of the app icant dated 11.12.1990. By the time this OA had been filed, the third respondent had not disposed of the appeal dated 25.1. 90. But, subsequently the said appeal of the applicant had been disposed of by dismissing the same.

5. During the pendency of this OA, the applicant died on 16.2.1993. After the death of the applicant, the LRs of the deceased applicant had contested the ~~contentions~~ Conviction and sentences passed against the applicant in the above 3 criminal ~~cases~~. Appeals pending in the High Court of Andhra Pradesh. Out of the 3 appeals which the deceased applicant had preferred before High Court, the ~~xxxxx~~ convictions and sentences ~~as against~~ of accused the deceased Appellant in two appeals were confirmed, and we are informed by the learned counsel for the applic nts in the present MA 918/93 that the appeal had been allowed in respect of one criminal ~~case~~ Appeal only. The fact that the convictions and sentences passed against the deceased applicant in the OA in two criminal appeals is not in dispute. As the applicant ~~xxx~~ died, his LRs, as already pointed out have filed the present MA 918/93 to come on record. were confirmed by the High Court

6. Shri NR Devraj, Standing counsel for the respondents in MA 918/93 had stoutly opposed MA 918/93. It is the contentio

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of the Learned counsel for the respondents that as there is no relief that could be granted in this case to the LRs of the deceased applicant in the OA that this MA 918/93 is liable to be dismissed.

7. We have heard in detail Mr PB Vijayakumar, counsel for the applicant and Mr NR Devraj, Standing counsel for the Respondents, in MA 918/93.

8. As already pointed out, during the pendency of this OA, the applicant in the OA died on 16.2.93 is not disputed in this MA. We may again point out that the convictions and sentences passed against the deceased applicant in the OA by the Special Judge for CBI cases, Visakhapatnam were confirmed in two cases by High Court of AP. It is also not in dispute that the LRs of the deceased applicant in the OA after his death had come on record before High Court and had contested the criminal appeals. It is also not in dispute that the applicant in the OA had been convicted of grave offences under the prevention of corruption act and also for offences u/s102-B,409,467,471IPC. It is also not in dispute that in view of the said convictions and sentences passed against the applicant that the competent authority had dismissed the applicant from service. In view of his conduct leading to the said conviction minimal charges It is needless to point out that during the pendency of the OA when an applicant dies, the first question to be decided is whether there is right to sue survives or not.

9. The words 'right to ~~issue~~ sue' must be interpretted to mean "right to seek relief". Unless the survivors are able to show thatthey have got a right to seek relief in this OA, they cannot come on record as the right to "sue" ~~issue to them~~ does not "survive" to them. Unless the applicant himself in the OA was entitled to the relief that he had prayed for in the OA the survivers will not be entitled to come on record and seek any relief. The reason being that the ~~survivers~~ LRs (Legal heirs who can take step

into the shoes of the deceased applicant cannot have better rights than the applicant in the OA. Even though it has been prayed in the OA that dismissal of the deceased applicant was not passed by the competent authority, the same contention was not pressed by the learned counsel for the applicants in MA 918/93, when MA 918/93 came up for hearing. But the learned counsel for the applicants in MA 918/93 relied on first proviso of Rule 19 of the Central Civil Services (Classification, control and Appeal) Rules, 1965 Rule 19 of Central Civil Services (CCA) Rules, 1965 reads as hereunder:

"19. Special Procedure in certain cases.

Notwithstanding anything contained in Rule 14 to 18,

(i) Where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge; or

(ii) where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or

(iii) where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules

the Disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit.

Provided, that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under Clause(i).

Provided further that the Commission shall be consulted where such consultation is necessary before any orders are made in any case under this rule."

Basing on the first proviso to said rule, it is contended that the applicant in the OA(deceased) had not been given an opportunity of making a representation on the penalty that was imposed on him and hence, the dismissal order is void and is liable to be set aside. In view of the above contention of the learned counsel for the applicant, it will be pertinent to refer to Article 311 of the Constitution of India, which reads as follows:

"311.DISMISSAL, REMOVAL OR REDUCTION IN RANK OF PERSONS EMPLOYED IN CIVIL CAPACITIES UNDER THE UNION OR A STATE

(1) No person who is a member of a civil service of the Union or an all-India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that, by which he was apppinted.

(2) No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

Provided that where it is proposed after such inquiry to impose upon him any such penalty, suchpenalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making represent tion on the penalty proposed.

Provided further that this clause shall not apply-

a) where ax person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

b) where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing it is not resonably practicable to hold such inquiry or

c) where the President or the Governor as the case xx may be is satisfied that in the interest of the security of the State it is not expedient to hold such inquiry.

(3) If in respect of any such person as aforesaid, a question arises where it is reasonably practicable to hold such inquiry as is referred to in clause (2) the decision thereo the authority empowered to dismiss or remove such person or to reduce him in rank shall be final.

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The second proviso to Article 311 of the Constitution of India will apply only where the conduct of a Government servant is such that, he deserved the punishment of dismissal, removal or reduction in rank. If the conduct of the governmen servant is such as to deserve punishment from those mentioned above, the second proviso cannot come into play at all because Art.311 is itself confined only to these three penalties. So, before denying the Government servant his Constitutional right, to an enquiry, the first consideration would be whether the conduct of the government servant is such as justifies any of the three penalties. Once that conclusion is reached by the competent authority and the conditions specified in the relevant ~~caluse~~ clause of the Second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to inquiry. As a matter of fact, Rule 19 of the CCS (Classification, Control & Appeal)Rules,1965 is framed for working out the second proviso to Art.311 of the Constitution of India. In view of the natre of convictions, the applicant in the OA had suffered, there cannot be any doubt about the fact that dismissal from service was the only penalty that could be imposed on him. So, rightly the applicant in the OA had been dismissed from service. As already pointed out, the argument of the learned counsel for the applicants in MA 918/93 is that without giving an opportunity by the competent authority with regard to the penalty proposed to be imposed upon the applicant, the applicant in the OA had been dismissed from service, and the same is violative of the principles of natural justice

and also violative of the proviso to Rule 19 of the CCS (Classification, Control and Appeal)Rules,1965.

9. Dealing with a similar contention, the Supreme Court in AIR 1985 SC 1417 Union of India Vs Tulsi Ram Patel held as follows:

" The language of the second proviso to Art.311(2) is plain and unambiguous. The keywords in the second proviso are "this clause shall not apply". By "this clause" is meant clause (2). As clause (2) requires an inquiry to be held against a Govt. servant the only meaning attributable to these words is that this inquiry shall not be held. The key words of the second proviso govern each and every clause of that proviso and leave no scope for any kind of opportunity to be given to a Govt. servant. The phrase "this clause shall not apply" is mandatory and not directory. It is in the nature of the Constitutional prohibitory injunction restraining the disciplinary authority from holding an inquiry under Art.311(2) or from giving any kind of opportunity to the concerned Government servant. There is thus no scope for introducing into the second proviso some kind of enquiry or opportunity by a process of inference or implication. Therefore the view that even where by the application of the second proviso the full inquiry is dispensed with. There is nothing to prevent the disciplinary authority from holding atleast a minimal enquiry or giving to the Govt. servant an opportunity of showing cause against the penalty proposed to be imposed or giving of charge sheet, or at least a notice informing the Govt. servant of the charges against him and calling for his explanation is wholly untennable."

The conclusion which flows from the express language of the second proviso to Art. 311 (2) is inevitable and there is no escape from it. It may appear harsh but the second proviso has been inserted in the Constitution as a matter of public policy and in public interest and for public good. It is in public interest and for public good that a government servant who has been convicted of a grave and serious offence or one rendering him unfit to continue in office should be summarily dismissed or removed from service instead of being allowed to continue in it at public expense and to public detriment. Sympathy and '

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commiseration cannot be allowed to outweigh considerations of public policy, concern for public interest, regard for public good and the peremptory dictate of a Constitutional prohibition. After all, it is not as if a government servant is without any remedy when the second proviso has been applied to him. There are two remedies open to him, namely departmental appeal and judicial review.

The principles of natural justice have come to be recognized as being a part of the guarantee contained in Art. 14 because of the new and dynamic interpretation given by the Supreme Court to the concept of equality which is the subject-matter of that Article. A violation of a principle of natural justice by a State action is a violation of Art. 14. Though the two rules of natural justice, namely, nemo judex in cause sua and audi alteram partem, have now a definite meaning and connotation in law and their content and implication are well understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. Not only can the principle of natural justice be modified but in exceptional cases they can even be excluded. If legislation and the necessitities of a situation can exclude the principles of natural justice including the audi alteram partem rule, a fortiori so can a provision of the Constitution, for a Constitutional provision has a far greater and all-pervading sanctity than a statutory provision. Clause (2) of Art. 311 embodies in express words the audi alteram partem rule. This principle of natural justice having been expressly excluded by a Constitutional provision, namely, the second proviso to clause (2) of Art. 311, there is no scope for reintroducing it by a side-door to provide once again the same inquiry which the Constitutional provision has expressly prohibited. To hold that once the second proviso is properly applied and clause(2) of Art. 311 excluded, Art. 14 will step into take the place of clause(2) would be to nullify the

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effect of the opening words of the second proviso and thus frustrate the intention of the makers of the Constitution. The second proviso is based on public good and the Constitution-makers who inserted it in Art. 311(2) were the best persons to decide whether such an exclusionary provision should be there and the situations in which this provision should apply.

A government servant is not wholly without any opportunity. Where the second proviso applies, though there is no prior opportunity to a government servant to defend himself against the charges made against him, he has the opportunity to show in an appeal filed by him that the charges made against him are not true. This would be a sufficient compliance with the requirements of natural justice."

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In view of the law laid down in Tulsi Ram Patel's case, it is not open for the learned counsel for the applicant to contend that the dismissal order is null and void, as the applicant in the OA had not been heard with regard to the punishment awarded to him. Hearing the applicant in the OA on proposed punishment as seen is only directory but not mandatory under the first proviso to rule 19 of the CCS(CCA) Rules,1965. So, the punishment of dismissal that is awarded to the applicant in our view does not suffer from any legal infirmity. The Supreme Court has explained in Challappan's case reported in AIR 1975 SC 2216 at Page 2220 the reasons for the rule in imposing the punishment of dismissal, removal or reduction in rank without complying with the provisions of Art.311(2) of according a reasonable opportunity of being heard as hereunder:

> "In the criminal trail charges are framed to give clear notice regarding the allegations made against the accused. secondly, the witnesses are examined and cross-examined, in his presence and by him and thirdly the accused is given full opportunity to produce his defence and it is only after hearing the arguments that the court passes the final order of conviction or acquittal. In these circumstances, if after conviction by the court, a fresh departmental inquiry is not dispensed with it will lead to unnecessary waste of time and expense and fruitless duplication of the same proceedings all over again. It was for this reason that the founders of the Constitution thought that where once a delinquent employee has been convicted of a criminal offence, that should be treated as sufficient proof of his misconduct and the disciplinary authority may be given the discretion to impose the penalties referred to in Art.311(2) namely, dismissal, removal or reduction in rank.....
> ....."

From the above discussion, it becomes amply evident even if the applicant in the OA had been alive, he had no right to get the dismissal order set aside in view of the convictions in the criminal cases. In view of the convictions in the criminal cases which are of a very serious and grave nature, as the applicant in the OA himself had no right to get dismissal order set aside, it is not open for the legal representatives to come on record as they have no right for any of the relief and no relief can be granted to the legal representatives. In view of this position, MA918/93 is liable to be dismissed.

10. A government servant who had been dismissed, removed or compulsorily retired from service, ~~MX~~ questions the dismissal, removal or compulsory retirement in a judicial forum and dies during the pendency of the proceeding in the judicial forum, with regard to the aspect whether the proceeding can be continued by the legal heirs of the said government servant , there is divergence of opinion among various High Courts. The learned counsel for the applicant has taken us through decisions showing the clevage of opinion in between the various High Courts on this issue. It is not necessary to go in detail or in depth into that question in this MA. But nevertheless, we may refer to a decision reported in 1969 SLR 188 TN Venkatachari Vs State of ~~Madhx~~ Andhra Pradesh. The facts of the said case are as follows:-

"The applicant in the writ appeal before the High Court of Andhra Pradesh, while serving as Principal of Govt. Training College, Nellore in 1956, certain allegations of corruption and mal-practices were made against him. The then Dy.Director of Public Instruction conducted preliminary inquiry into the allegations and submitted his report to the Government. As the Government saw a prima facie case of corruption,etc., a regular departmental inquiry was ordered. In the departmental

inquiry, the appellant in the writ appeal was found guilty of some charges. Ultimately, following the due procedure at law, the Government directed the compulsory retirement of the said Principal of Govt. Training College, Nellore, as a measure of punishment. After exhausting the alternative remedies, the appellant in the writ appeal filed writ petition on 18.4.62 questioning the order of retiring him compulsorily as a measure of punishment. The said matter was heard by a learned single Judge of AP High Court and the writ petition was dismissed, holding that there was no case for interference. The writ petition was dismissed by the Single Judge of the Hon'ble High Court of AP on 19.3.64. The applicant filed writ appeal in the AP High Court on 29.6.64 against the said order of dismissing the writ petition. During the pendency of the writ appeal, the appellant died on 7.4.66 and his legal representatives were brought on record by the orders of the Deputy Registrar purporting to continue the appeal. A preliminary objection was raised by the learned Govt. pleader that the cause of action did not survive and that the writ appeal abated. The High Court of Andhra Pradesh held that the cause of action which was purely personal to the writ appellant would not survive to the LRs and who must be deemed to be third parties cannot be persons aggrieved to seek relief under Art.226 of the Constitution alleging infraction of their personal or individual rights. The observation of the AP High Court in the said judgement applies on all fours to the facts of this case. So, from the above said decision, it is also clear that the applicants (LRs) in MA 918/93 absolutely have no right to continue the proceeding after the death of the applicant in the OA897/91.

All

11. For the reasons mentioned above, MA 918/93 filed by the LRs of the deceased applicant in OA897/91 to come on record is hereby dismissed. As MA 918/93 is dismissed, the OA abated. Hence the OA is dismissed as abated.

(T.CHANDRASEKHARA REDDY)
Member(Judl.)

(A.B. GORTHI)
Member(Admn)

Dated: 1-12- 1993

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Deputy Registrar(Judl.)

Copy to:-

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2. The Chief Engineer, Southern Zone-II, CPWD, Madras.
3. The Director(Engineering), CPWD, Govt of India, Nirman Bhavan, New Delhi.
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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH : HYDERABAD

THE HON'BLE MR.JUSTICE V.NEELADRI RAO
VICE-CHAIRMAN

AND

THE HON'BLE MR.A.B.GORTHI :MEMBER(A)

AND

THE HON'BLE MR.T.CHANDRASEKHAR REDDY
MEMBER(J)

AND

THE HON'BLE MR.R.RANGARAJAN :MEMBER(A)

Dated: 1/12/1993

~~ORDER~~/JUDGMENT:

M.A/R.A/C.A.No.

in
O.A.No. 897/91

T.A.No. (W.P.)

Admitted and Interim directions issued.

Allowed.

Disposed of with directions.

Dismissed.

Dismissed as withdrawn.

Dismissed for default.

Rejected/Ordered.

No order as to costs.

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