

14-2-2008

Mr. S.K. Jain with Mr. P.N. Jatti, Counsel for applicant.

Mr. B.N. Sandu, Counsel for respondents

Heard learned Counsel for the parties.

Order Reserved.

(*G. P. Shukla*)
(G. P. Shukla)
M (A)

(*M. L. Chauhan*)
M (I)

15-2-2008

order pronounced today
in the open court by
the aforesaid Bench.

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15.2.08
C.O.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

JAIPUR, this the 15th day of February, 2008

ORIGINAL APPLICATION No.300/2003

CORAM:

HON'BLE MR.M.L.CHAUHAN, MEMBER (JUDICIAL)
HON'BLE MR. J.P.SHUKLA, MEMBER (ADMINISTRATIVE)

Naresh Kumar
s/o Ravindra Kumar,
r/o Near Tie Factory,
Jhalawar Road, Baran (Raj.),
Ex. Extra Departmental Postmaster,
Fatehpur, Distt. Baran.

... Applicants

(By Advocate: Shri S.K.Jain and Mr. P.N.Jatti)

Versus

1. Union of India through the Secretary to the Govt. of India, Department of Posts, Ministry of Communications, New Delhi.
2. Director, Postal Services, Rajasthan Southern Region, Ajmer.
3. Senior Supdt. of Post Offices, Kota Division, Kota.

... Respondents

(By Advocate: Shri B.N.Sandu)

162

O R D E R

Per Hon'ble Mr. M.L.Chauhan.

The applicant has filed this OA thereby praying for the following reliefs:-

- i) That the impugned order Annexure A-1, A-2 and A-3 be quashed being illegal and unconstitutional and capricious and violative of articles 14 and 16 of the Constitution of India and principles of natural justice.
- ii) That the respondents be directed by issuance of an appropriate order or direction to reinstate the applicant in service as E.D.B.P.M. Fatehpur with all consequential benefits.
- iii) Any other relief which this Hon'ble Tribunal thinks just and proper in favour of the applicant including costs.

2. Briefly stated, facts of the case are that the applicant was engaged as Extra Departmental Branch Postmaster (for short, EDBPM), Fatehpur, Distt. Baran provisionally subject to verification of character and antecedents pursuant to the order passed by the Senior Superintendent Post Offices, Kota Division, Kota dated 15.6.98. A report was called from the District Magistrate, Baran and after verification it was found that a criminal case was pending against the applicant in the Court of law and accordingly in pursuance of the said report of the District Magistrate, the applicant was allowed to continue on temporary and provisional basis till finalization of the case. Since the applicant was not exonerated by the Chief Judicial Magistrate, Baran and he was found guilty in case No. 239/98, as such, his services were terminated vide

order dated 23.5.2001. The said action of the respondent No.3 was challenged by the applicant by filing OA No.233/2001. The said OA was disposed of by this Tribunal vide order dated 18.11.2002 with direction to the applicant to make representation against the said termination order to the respondents within a period of one month and the respondents shall consider the same and pass an appropriate order within three months after receipt of the said representation. However, liberty was reserved to the applicant to approach again in case he is aggrieved against the final order passed on his representation. Pursuant to the order passed by this Tribunal, the applicant made a representation to respondent No.3 on 9.12.2002 and the same was rejected vide impugned letter dated 23.12.2002 (Ann.A2). The appeal submitted by the applicant to the Director, Postal Service, Rajasthan Southern Region, Ajmer on 26.2.2003 (Ann.A9) was also rejected vide impugned order dated 7.5.2003 (Ann.A3). It is these orders, which are under challenge in this OA.

The applicant has taken 5 grounds to assail the impugned order, as can be seen from para 5 of the OA namely:-

- i) That the applicant is a regular appointee and cannot be dislodged from his duties in this manner,
- ii) That the action on the part of the respondent No.3 in issuing show cause

notice dated 28/30.3.2001 and subsequent order of termination dated 23.5.2001 (Ann.A10 and A11) is absolutely wrong as the Chief Judicial Magistrate, Baran has released the applicant under Section 4 of the Probation of Offenders Act, 1958 and the learned magistrate has specifically said that this will not affect the service of the applicant in any manner. In another case, damage of Rs. 100/0 was ordered.

- iii) That the respondent No.3 bitterly failed to apply his mind in terminating services in as much as he has not considered whether conduct of the applicant was such as to render him unsuitable for the job. For this, he has to issue proper notice mentioning reasons for treating the conduct bad.
- iv) That the memo of termination of service is also not issued as per the rules. Rule 8-A of the P&T ED Agents (Conduct and Service) Rules, 1964 and Rule 19 of the C.C.S. (C.C.A.) Rules can not be invoked in this case, and
- v) That the Director, Postal service has not applied his mind whether conduct of the applicant was such as to render him unsuitable for the job. He has said that the applicant has been released on (Parole). It is strange that the Director, postal Services does not understand difference in Probation and Parole. He has virtually harped on the same string and followed the Senior Superintendent of Post Offices and has not applied his mind in deciding the appeal.

3. Notice of this application was given to the respondents. The respondents have filed reply. The facts, as stated above, have not been disputed by the respondents. However, in the reply, the respondents have specifically stated that engagement of the applicant was provisional and on temporary basis on

the post of EDBPM, Fatehpur, Distt. Baran. Based on requirement, the applicant furnished attested copies of relevant certificates at the time of applying for appointment on the said post viz. Marksheets, residence certificate, character certificate and income certificate as is evident by engagement order issued to ASPO, Baran in his case. Copy of the said appointment order has been placed at Ann.R1. It is further stated that in this engagement order it was clearly written to the ASPO, Baran to make further verification of the certificates within seven days and in case of satisfactory results the applicant may be engaged on the post. The applicant was engaged provisionally by the ASPO pending verification of character verification pending with the Collector/Police authorities. The process of verification of conduct was under way and the formal appointment of the applicant was linked with the satisfactory verification of his conduct/character report and therefore he was never regularly appointed as EDBPM, Fatehpur B.O. Subsequently, in the report of conduct/character verification received from Collector, Baran on 26.6.2000 vide his letter dated 21.6.2000 (Ann.R2) it emerged that a case No.407/98 was registered against the applicant and pending in the Kotwali, Baran and till finalization no report could be given about conduct of the applicant. Therefore, the applicant was allowed provisionally

till finalization of the case. The applicant was not exonerated by the court which found him guilty in case No.239/98 and punished with fine of Rs. 100/- as per the judgment in the case (Ann.A11) and in another case No.174/96 the court found the applicant guilty and punished him with fine of Rs. 250/- as per judgment Ann.A10. Thus, according to the respondents, it was proved beyond reasonable doubt that the applicant was convicted in criminal offence by the court of law. He was in temporary capacity engaged on provisional basis and issue of his regular appointment orders was subject to satisfactory verification of his character. Therefore, it was not considered to retain him any further even in temporary capacity. It is further stated that the applicant committed a crime and the probation cannot wash the stigma of crime and accordingly the superior authority decided his appeal in view of this fact. The respondents have also relied upon the decision of the Hon'ble Supreme Court in Union of India and ors. Vs. Bakshi Ram, AIR 1990 SC 987 where it was held that the accused who was released on probation should not be reinstated in service.

4. The applicant has filed rejoinder thereby reiterating the submissions made in the OA,

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5. We have heard the learned counsel for the parties and gone through the material placed on record.

6. From the material placed on record, it is evident that the Senior Superintendent of Post Offices (SSPO), Kota was the appointing authority of the applicant. Vide order dated 15.6.98 (Ann.R1) the SSPO (respondent No.3) has directed the ASPO, Baran to engage the applicant purely on temporary and provisional basis subject to verification of certificates including character certificate. Thus, in view of order dated 15.6.98 issued by the appointing authority it was not permissible for the ASPO, Baran to engage the applicant even on temporary and provisional basis pending character verification by the Collector/police authorities. However, the applicant was engaged on temporary and provisional basis by the ASPO, Baran contrary to the condition laid down by the appointing authority while approving appointment of the applicant. Thus, the engagement of the applicant on temporary and provisional basis by the ASPO, Baran contrary to the approval granted by the appointing authority was illegal.

Further, in terms of DG, P&T letter No.43/66-Pen., dated 17th October, 1966, the character and antecedents of ED Agents should be verified in advance. There is also instruction dated 2nd July, 1954 which stipulates that where it is found necessary to

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make appointment before complete verification, appointment may be made on production of Character Certificate from two Gazetted Officers and the appointment order should contain a warning that if he is subsequently found unsuitable, he shall be discharged forthwith. Thus, in view of what has been stated above, we are of the firm view that appointment of the applicant was provisional and on temporary basis, contrary to the instructions issued by the Postal Department, as stated above and also contrary to the stipulation laid down by the appointing authority for engaging the applicant. As such, the applicant has no right to continue in service and it was permissible for the respondents to dispense with the services of the applicant in terms of condition laid down by the appointing authority while approving appointment of the applicant and in view of the instructions issued by the Department, even without resorting to issuance of show-cause notice. Thus, the contention of the applicant that his appointment was regular is without any basis, hence rejected.

Be that as it may, from the material placed on record, it is evident that as per report of conduct and character verification received from the Collector, Baran dated 26.6.2000 vide his letter dated 21.6.2000 (Ann.R2) it is evident that case No. 407/98 under Section 451, 323 and 34 was pending before the competent court. Thus, in view of the said report,

where a person is involved in a criminal case, it was not permissible for the authority concerned to engage that person in terms of the instructions issued in that behalf. Still the applicant was allowed to continue by ASPO, Baran on temporary and provisional basis till finalization of the case. The applicant was subsequently convicted by the Court of Chief Judicial Magistrate, Baran, under Section 323/34 IPC. The applicant was released on probation in another case i.e. case No. 175/96 and also in case No. 407/98, as such, the contention of the applicant that he was exonerated by the Trial Court is ill conceived.

The learned counsel for the applicant has vehemently argued that case of the applicant was covered under Rule 11 of Gramin Dak Sevak (Conduct and Employment) Rules, 2001 (for short, 2001 Rules), as such, it was not permissible for the respondents to issue show-cause notice under Rule 6 of Gramin Dak Sevak (Conduct and Employment) Rules, 1964 (for short, 1964 Rules) which is equivalent to Rule 8 of the 2001 Rules. When the attention of the learned counsel for the applicant was invited to the pleadings made in this behalf, the learned counsel for the applicant relied upon ground No.5.3 of the OA, whereby the following averment has been made:-

"3. That the Senior Superintendent of Post Offices, Kota Division, Kota has bitterly failed to apply his mind in terminating the services in as much as he has not considered whether conduct of the applicant was such as to render him

unsuitable for the job. For this he has to issue proper notice mentioning reasons for treating the conduct bad."

From the portion as quoted above, it is clear that the contention as raised by the applicant during the course of arguments is not based on the pleadings as raised above. As can be seen from the para 5.3 of the pleadings the submissions made by the applicant was that the authority has not considered whether conduct of the applicant was such as to render him unsuitable for the job which was admittedly the requirement under Rule 11 of the 2001 Rules (Rule 8 A of 1964 Rules). As already stated above, the specific case of the respondents was that the service of the applicant was required to be terminated in terms of Rule 6 of 1964 Rules (now Rule 8 of 2001 Rules) and show-cause notice was also issued in terms of the aforesaid Rules and even the order ~~was~~ passed by the Disciplinary Authority was in accordance with Rule 8 of 2001 Rules. As such, reliance placed by the respondents to Rule 11 of 2001 Rules is wholly misconceived. The respondents were neither required to issue show-cause notice in terms of Rule 11 nor they were required to consider case of the applicant in terms of this Rule. The learned counsel for the applicant is harping on the sentence in the show-cause notice that "as the applicant has been convicted by the CJM-Baran" and thus, arguing that service of the

applicant has been terminated on the basis of his conviction by the CJM-Baran, as such, provision of Rule 11 are attracted in the instant case. The submissions made by the learned counsel for the applicant is wholly misconceived, inasmuch as, if the contents of show-cause notice as well as the order passed by the Disciplinary Authority is seen in its entirety, it is quite evident that the show-cause notice was issued to the applicant on the basis that character and antecedents of the applicant were doubtful so as not to retain him in service. It was in that context that conduct and conviction of the applicant by the Trial Court was taken into account while terminating the service of the applicant. It can neither be gathered from the show-cause notice Ann.A5 nor from the impugned order of termination Ann.A1 that service of the applicant was terminated on account of conduct which led to his conviction by the Trial Court. Thus, we are of the view that case of the applicant was neither covered under Rule 11 of 2001 Rules nor the respondents have invoked such power and the applicant was not terminated on the basis of conduct which has led to his conviction, which was sine qua non for attracting the provisions of Rule 11. The service of the applicant was terminated because admittedly, the applicant has not rendered 3 years of continuous employment with the Department and order of termination simplicitor casting no stigma and strictly

49

in conformity with Rule 8 of 2001 Rules (Rule 6 of 1964 Rules). The applicant was also held entitled to the amount of basic allowance + dearness allowance of one month in lieu of notice of termination which is strictly in consonance with Rule 8 of 2001 Rules, whereas there is no such requirement stipulated in Rule 11 where the service has to be terminated on the basis of conduct which led to conviction on account of criminal charge. As already stated above, that is neither the case of the Department nor show-cause notice was issued by the Department, as such, the contention raised by the applicant deserves out right rejection.

The learned counsel for the applicant has also cited some judgments regarding applicability of Rule 11 of 2001 Rules which we need not be noticed as we are of the firm view that service of the applicant has not been terminated in terms of Rule 11 of 2001 Rules (Rule 8 A of 1964 Rules).

Further the applicant has also filed appeal before the Appellate Authority. The learned counsel for the applicant failed to show that the point which is now sought to be raised that his case was covered under Rule 11 and no show-cause notice was issued under Rule 11 and that his service was terminated on account of conduct which had led to his conviction by the Criminal Court was ever raised before the Appellate Authority or pursuant to show-cause notice

Ann.A5 or in the representation made by the applicant before respondent No.3 pursuant to observations made by this Tribunal in earlier OA. As such, the applicant is precluded from raising this point for the first time in this OA, without raising the same before the departmental authorities as held by the Hon'ble Apex Court in Para 6 in the case of Deokinandan Sharma vs. Union of India and ors., 2001 SCC (L&S) 1079.

At this stage, it will also be relevant to mention that in case No.175/96 under Section 447, 324 IPC the applicant was convicted by the Chief Judicial Magistrate, Baran vide his judgment dated 31.7.99 (Ann.A10) but released on probation. On the basis of this finding, it is pleaded in the OA that it was not permissible for the respondents to terminate services of the applicant.

7. We have given due consideration to the submission made by the applicant and are of the firm view that the applicant has not made out any case for our interference. As already stated above, the appointing authority i.e. respondent No.3 has approved appointment of the applicant subject to verification of his character and antecedents and other certificates. It was not permissible for the lower authority i.e. ASPO, Baran to engage the applicant pending character verification by the Collector/police authorities. Thus, his engagement to the post of EDBPM

was not in accordance with the order passed by the appointing authority, as such illegal. That apart, the applicant has been convicted by the Trial Court in case No.239/98 (Ann.A11). Thus, the fact remains that the applicant has been convicted, although instead of awarding sentence of imprisonment to the applicant, he has been imposed a fine of Rs. 100/- and was directed to furnish bond for a period of two years to maintain peace during the aforesaid period. Simply because the applicant has been granted benefit under Probation of Offenders Act in case No. 175/96 and the Trial Court has observed that as the accused has been released on probation, this may not effect his service career in view of the provisions contained in Probation of Offenders Act, will not materially change the position of the applicant and still he can be removed from service in view of the law laid down by the Apex Court. At this stage, it may be relevant to quota decision of the Apex Court in Union of India and Ors. vs. Bakshi Ram, 1990 SCC (L&S) 288. In this case, the Apex Court considering the fact of applicability of Section 3,4 and 12 of the Probation of Offenders Act and referring to the decision of the Apex Court in Divisional Personnel Officer, Southern Railway vs. T.R.Chellappan, 1976 SCC (L&S) 398 has held as under:-

8. It will be clear from these provisions that the release of the offender on probation does not obliterate the stigma of conviction. Dealing with the scope of Sections 3,4 and 9 of the Probation of

Offenders Act, Fazal Ali J. in Divisional Personnel Officer, Southern Railway vs. T.R.Chellappan speaking for the court observed: (SCC p.198, para 11)

"These provisions would clearly show that an order of release on probation comes into existence only after the accused is found guilty and is convicted of the offence. Thus the conviction of the accused or the finding of the court that he is guilty cannot be washed out at all because that is the sine qua non for the order of release on probation of the offender. The order of release on probation is merely in substitution of the sentence to be imposed by the court. This has been made permissible by the statute with humanist point of view in order to reform youthful offenders and to prevent them from becoming hardened criminals. The provisions of Section 9(3) of the Act extracted above would clearly show that the control of the offender is retained by the criminal court and where it is satisfied that the conditions of the bond have been broken by the offender who has been released on probation, the court can sentence the offender for the original offence. This clearly shows that the factum of guilt on the criminal charge is not swept away merely by passing the order releasing the offender on probation. Under Section 3,4 or 6 of the Act, the stigma continues and the finding of the misconduct resulting in conviction must be treated to be a conclusive proof. In these circumstances, therefore, we are unable to accept the argument of the respondents that the order of the Magistrate releasing the offender on probation obliterates the stigma of conviction."

9. As to be scope of Section 12, learned Judgment went on (at 596): (SCC p.198, para 12).

"It was suggested that Section 12 of the Act completely obliterates the effect of any conviction and wipes out the disqualification attached to a

conviction of an offence under such law. This argument, in our opinion, is based on a gross misreading of the provisions of Section 12 of the Act. The words "attaching to a conviction of an offence under such law" refer to two contingencies: (i) that there must be a disqualification must be provided by some law other than the Probation of Offenders Act. The Penal code does not contain any such disqualification. Therefore, it cannot be said that Section 12 of the Act contemplates an automatic disqualification attaching to a conviction and obliteration of the criminal misconduct of the accused. It is also manifest that disqualification is essentially different in its connotation from the word 'misconduct'."

10. In criminal trial the conviction is one thing and sentence and sentence is another. The departmental punishment for misconduct is yet a third one. The court while invoking the provisions of Section 3 or 4 of the Act does not deal with the conviction; it only deals with the sentence which the offender has to undergo. Instead of sentencing the offender, the court releases him on probation of good conduct. The conviction however remains untouched and the stigma of conviction is not obliterated. In the departmental proceedings the delinquent could be dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge (See Article 311 (2)(b) of the Constitution and Tulsiram Patel case).

11. Section 12 of the Act does not preclude the department from taking action for misconduct leading to the offence or to his conviction thereon as per law. The section was not intended to exonerate the person from departmental punishment. The question of reinstatement into service from which he was removed in view of his conviction does not, therefore, arise. That seems obvious from the terminology of Section 12. On this aspect, the High Courts speaks with one voice.....

up It was further observed in para 13 that:-

"13. Section 12 is thus clear and it only direct that the offender "shall not suffer disqualification, if any, attaching to a conviction of an offence under such law". Such law in the context is other law providing for disqualification on account of conviction. For instance, if a law provides for disqualification of a person for being appointed in any office of for seeking election to any authority or body in view of his conviction, that disqualification by virtue of Section 12 stands removed. That in effect is the scope and effect of Section 12 of the Act. But that is not the same thing to state that the person who has been dismissed from service in view of his conviction it entitled to reinstatement upon getting the benefit of probation of good conduct. Apparently, such a view has no support by the terms of Section 12 and the order of the High Court cannot, therefore, be sustained." (emphasis ours).

The matter was again considered by the Apex court in the case of Harichand vs. Director of School Education, 1998 SCC (L&S) 560. In this case, the Apex Court has distinguished the decision rendered by the Apex Court in the case of Aitha Chander Rao vs. State of A.P., 1981 Supp SCC 17 whereby the Sessions Judge while holding the accused guilty of contributory negligence has observed that having regard to the peculiar circumstances of the case it was though to be fit case to release the said Rao on probation. The Court further added that as the appellant has been released on probation this may not affect his service career in view of Section 12 of the Probation of Offenders Act. The Apex Court held that in Rao's case there was no discussion of the provisions of Section 12 or of the meaning of the words "disqualification,

if any, attaching to a conviction of an offence under such law" therein. Thus, the order cannot be regarded as a binding precedent upon this point. The Apex Court in Para 7 has further held that:-

"7. In our view, Section 12 of the Probation of Offenders Act would apply in respect of a 'disqualification that goes with a conviction under the law which provides for the offence and its punishment. That is the plain meaning of the words "disqualification, if any, attaching to a conviction of an offence under such law" therein. Where the law that provides for an offence and its punishment also stipulates a disqualification, a person convicted of the offence but released on probation does not, by reason of Section 12, suffer the disqualification. It cannot be held that, by reason of Section 12, a conviction for an offence should not be taken into account for the purpose of dismissal of the person convicted from government service. (emphasis ours).

Thus, the Apex Court held that in case a person has been released on probation, it cannot be said that such conviction for an offence should not be taken into account for the purpose of dismissal of the person from Government service.

It may also be relevant to state here that the view taken by the Apex Court in Bakshi Ram (supra) was further reiterated by the Apex Court in the case of Punjab Water and Supply Sewerage Board and anr. Vs. Ram Sajivan and anr., (2007) 2 SCC (L&S) 668.

8. Thus viewing the matter from any angle, we are of the view that the respondents have not committed any

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infirmity while terminating the services of the applicant, for the reasons recorded hereinabove. Accordingly, the OA is dismissed with no order as to costs.



(J.P. SHUKLA)

Admvt. Member



(M.L.CHAUHAN)

Judl. Member

R/