Sachindra Nath Sen Gupta Vs The General Manager, North East Frontier Railway, Maligaon and others

Court: Gauhati High Court

Date of Decision: May 3, 1972

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 2 Rule 2
Constitution of India, 1950 â€" Article 226

Citation: AIR 1973 Guw 108

Hon'ble Judges: P.K. Goswami, C.J; M.C. Pathak, J

Bench: Division Bench

Advocate: K. C. Bezbarua and B. Choudhuri, for the Appellant; A. R. Barooah and M. K. Sharma, for the Respondent

Final Decision: Allowed

Judgement

P. K Goswami, C. J.

1. This is an application under Article 226 of the Constitution of India for an appropriate writ directing the respondents to forbear from realising

certain alleged overpayments made to the petitioner and for directing them to pay him his salary and other emoluments due to him as Assistant

Traffic Superintendent from 26th August, 1963 to 18th January, 1968, in which post he was ordered to be reinstated by the order of the High

Court affirmed by the Supreme Court. In his petition, he also claimed his pension to be fixed at the rate of Rs. 292/- per mensem on the basis of

the aforesaid reinstatement to service and this has since been acceded to by the respondents and therefore, we are not concerned with this

particular relief. (Para. 5 of the counter-affidavit of the respondents).

2. Before we deal with the matter, we may briefly state the facts. The petitioner was a permanent Railway servant holding the post of Assistant

Traffic Superintendent in the North-East Frontier Railway. His services were terminated with one month''s notice under Rule 148 of the Indian

Railway Establishment Code with effect from 2nd December, 1957. Failing to get redress from the railway authorities, the petitioner, after the

decision of the Supreme Court in Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., disposed of on 5th

December, 1963 moved a writ application in this Court (Civil Rule No. 2 of 1965) challenging the order of termination of service. This court

allowed the application on 16th February, 1967 and the operative part of the order may be quoted:

We accordingly allow this petition to make the Rule absolute and direct the opposite parties to restore the petitioner to office so that his rights,

whatever they be, may not in any way be prejudiced by reason of the order under the abortive Rule 148 of the Railway Code. We also allow

costs of this petition which we assess at Rs. 100/-"".

Respondents obtained special leave of the Supreme Court in Civil Appeal No. 1839 (N) of 1967 and also obtained an ex parte stay of this court''s

above order on 1st December, 1967, which was made absolute on 22nd February, 1968 on terms.

The Supreme Court dismissed the above Civil Appeal on 22nd August, 1969 and the stay order was vacated.

It is therefore, clear that the order or reinstatement passed by the High Court has got to be implemented by the Respondents and that could be

only implemented after the Supreme Court vacated the stay order on dismissal of the appeal on 22nd August, 1969. Indeed, the General Manager

on 17th January 1970 reinstated the petitioner, who had meanwhile retired from his temporary employment on 18th January 1968, in the following

terms:

In pursuance of the Supreme Court''s Judgment delivered on 1-9-69 (should be 22-8-69), Shri S. N. Sen Gupta Ex. A. T. S./B. P. B. has been

treated as having been in continuous service upto 18-1-68 (date of superannuation being on 19-1-68 F. N.) his termination of service with effect

from 1-12-57 under Rule 148/149 R. I. being declared void and illegal by the Supreme Court"".

Even so, on the other hand, far from implementing that order, the respondents are taking such steps as are calculated to nullify the effect of the

order of this Court, since affirmed by the Supreme Court. We are therefore, not a little surprised when the respondents would contend before us

that the claim of the petitioner for salary and allowances on the basis of his being in service as Assistant Traffic Superintendent, on reinstatement, is

not tenable in law. The learned counsel for the respondents submits that the claim is barred by limitation as, if a suit were filed by the petitioner for

arrears of salary, his claim for more than three years would be barred under Article 7 of the Limitation Act. This submission has to be mentioned

only to be rejected. There is no question of the petitioner filing a suit for his claim to arrears of salary when the order of the High Court reinstating

him in service has not yet been complied with by the Respondents. On the other hand, we feel that the action of the railway authorities is bordering

on contempt, although we are conscious that the General Manager was only acting under direction of the Railway Board. It is for this reason that

we are not considering for taking any action in the matter against the railway authorities for not implementing the order of this court on dismissal of

the respondents'' appeal by the Supreme Court.

3. The learned counsel drew our attention to a decision of the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others, to support

his contention that we should reject this application on the ground of Inordinate delay by invoking the principles of the limitation Act. Their

Lordships'' observations relied upon by the learned counsel, related to what is unreasonable delay for an application under Article 226 if the

Constitution. There is no question of inordinate delay in this case as the petitioner was unable to ask for implementation of this court''s order while

the matter was sub judice in appeal before the Supreme Court.

4. The learned counsel also relied upon a Full Bench decision reported in AIR 1968 P&H 441 (Jagdish v. Union of India). The Full Bench had to

resolve a conflict of decisions of several Division Benches of the Court taking opposite views. While one view was that a dismissed employee, on

reinstatement could claim arrears of salary in a suit, if in time, for the entire period of his forced unemployment the other view was that the

employee was not entitled to claim his salary for more than three years two months prior to the institution of the suit. The Full Bench reached the

conclusion that the second view was correct. The Full Bench was dealing with a case arising out of an application under Article 226 of the

Constitution and held that the same considerations as are applicable to a suit were applicable to that case. The Full Bench took this view relying

upon a decision of the Supreme Court in State of Madhya Pradesh Vs. Bhailal Bhai and Others, . We are, however, with respect unable to read in

the above decision that the Supreme Court has made it an inexorable rule that in no case even where justice would require it, an application under

Article 226 of the Constitution cannot be entertained beyond the period of limitation applicable in a suit. On the other hand, their Lordships of the

Supreme Court have used a guarded language to the effect that ""where the delay is more than this period, it will almost always be proper for the

court to hold that it is unreasonable."" We, therefore, feel justified in holding that in a proper and appropriate case where justice demands that a writ

should issue, the plea of limitation may not stand in the way. In the very decision, their Lordships have agreed with the submission ""that the

provisions of the Limitation Act do not as such apply to the granting of relief under Act. 226."" It is, therefore, conceivable that notwithstanding

delay in a case if the High Court, having regard to the entire background, nature and circumstances of a case and to the conduct of parties in the

course of a particular dispute, chooses to exercise its jurisdiction in favour of issuing a writ under Article 226 of the Constitution, there is nothing in

the Limitation Act to bar such exercise of power. We are, therefore, clearly of opinion that considerations on the score of limitation in a suit may

have to give way to the justice of the case on the writ side, when it is demanded.

5. What is the justice in this case? The petitioner was discharged on 2nd December, 1957 under Rule 148 of the Railway Establishment Code

which was struck down by the Supreme Court in Moti Ram Deka etc. Vs. General Manager, N.E.F. Railways, Maligaon, Pandu, etc., . The

petitioner obtained a writ from the High Court directing reinstatement on 16th February 1967. The order of the High Court was stayed by the

Supreme Court on appeal by the respondents. The appeal was finally dismissed, and the stay was vacated by the Supreme Court on 22nd August

1969. It is therefore, no fault of the petitioner that he could not secure implementation of the order of the High Court in time. It is in this context, on

refusal by the respondents to fully implement the order of the High Court, affirmed by the Supreme Court, that he had to move the High Court

under Article 226 for a writ and obtained the present Rule on 16th September 1971. To expect the petitioner in the above circumstances to file a

civil suit for realisation of his salary on the basis of the order of reinstatement and to invite a successful defence by the respondents on the ground of

limitation would be to look for the absurd. The earlier application under Article 226 of the Constitution against the order of wrongful termination

from 2-12-1957 was made on 22nd December, 1964 and the Supreme Court in appeal did not consider the delay as an unsurmountable ground

against reinstatement, although the respondents had urged, to that effect. Besides, the respondents have paid the petitioner''s arrear-salary from

2nd December 1957, the date of termination of service, to 25th August, 1963, in May 1970, after dismissal of the appeal by the Supreme Court.

They, therefore, voluntarily paid a portion of what they now describe as a barred claim. Further, they accepted the claim of the petitioner regarding

his pension at the rate of Rs. 292/- p. m. which also goes to show the inconsistent stand of the respondents in resisting the present claim of the

petitioner in this court now. It is, therefore, preeminently an appropriate case where the High Court should exercise its powers under Article 226 of

the Constitution and quash the impugned notice of 29th July 1971 and direct payment of the salary and all emoluments due to the petitioner. We

are clearly of opinion that in the entire history and circumstances of the case, the petitioner''s application cannot be rejected on the ground of

unreasonable delay.

6. The learned counsel also strenuously relied upon the order of the Railway Board restricting the payment of arrears to the period of three years

backwards from the date of the judgment of the Supreme Court (Annexure 1 to the counter-affidavit). Such a restriction is illegal, arbitrary and

invalid in face of the High Court''s order of reinstatement. We should observe, as already noticed, that in the appeal before the Supreme Court, a

submission was made on behalf of the respondents, who were appellants there ""that the railway authorities would have found lot of difficulty and

inconvenience in reinstating employees without taking into consideration the period which had elapsed."" The Supreme Court held that the

submission was ""devoid of any merit"" In face of the observations of the Supreme Court, with regard to the case of the identical petitioner, it is

inexplicable and astounding that the Railway Board should have thought it fit to pass the order on 29th September 1970 contained in Annexure 1

to the counter-affidavit.

7. The further argument that the claim is barred under Order 2, Rule 2, C. P. C. is also wide of the mark. We may refer to the decision of the

Supreme Court in Devendra Pratap Narain Rai Sharma Vs. State of Uttar Pradesh, , where the Supreme Court held that bar of Order 2. Rule 2

may not apply to a petition under Article 226 of the Constitution.

8. In the result, the application is allowed. The impugned notice dated 29th July 1971 is quashed. The respondents are directed to pay the

petitioner his salary and allowances treating him as being in service as Assistant Traffic Superintendent from the date of termination of service till the

date of his retirement with all allowances and benefits he is entitled to in his employment as such. The amount which has been already received by

the petitioner shall be deducted from the actual amount found due. The petitioner will, however, be not entitled to any monetary benefit which was

given to him for the period of his temporary employment in an inferior post under the Railway. The amount if any, already drawn by him on this

account shall also be deducted from his total claim. The Rule is made absolute on the above terms. The petitioner will be entitled to costs, which

we assess at Rs. 250/-

M. C Pathak, J.

9. I agree.