(1999) 11 BOM CK 0041

Bombay High Court (Aurangabad Bench)

Case No: Writ Petition No. 273 of 1985

Shri Prabhakar Waikar		APPELLANT
	Vs	
The State of Maharashtra and Others		RESPONDENT

Date of Decision: Nov. 22, 1999

Acts Referred:

- Constitution of India, 1950 - Article 12, 14, 16, 226
- Marathwada Development Corporatin (Services) Rules - Rule 62

Citation: (2000) 2 ALLMR 333 : (2000) 1 BomCR 909 : (2000) 1 MhLj 248

Hon'ble Judges: B.H. Marlapalle, J; A.S. Bagga, J

Bench: Division Bench

Advocate: Kiran Nagarkar for S.B. Talekar, for the Appellant; D.V. Tele, A.G.P. and Suresh Kulkarni, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

B.H. Marlapalle, J.
The petitioner has brought in question the order of termination of his service dt. 16-1-1985 passed by invoking Rule 62 of the Service Rules applicable to him.

2. The petitioner came to be appointed as Manager of a Workshop started by M/s Godawari Garments Ltd. respondent No. 2 which is a subsidiary of respondent No. 3, Marathwada Development Corporation Ltd. (a State Undertaking). This appointment order was issued on 24-2-76, on a consolidated salary of Rs. 700/- per month and on probation of one year. He came to be transferred from Latur to Nanded, as Production Manager of Godawari Garment''s Sales Division on 11-12-1977; deputed to Kinwat Roofing Tiles Ltd. in the year 1981 as Works Manager on temporary basis; as Store Keeper at Central Stores in 1982; as Centre-in-charge at Pishor in 1983 and finally, by

letter dt. 7-1-1984, he was brought back to Aurangabad, as Centre-in-charge-Cum-Cutter. The petitioner was on leave in the month of May 1984 on the ground of his (ill) health. He was called upon to report for duty after expiry of the initial leave and the petitioner by his letter dt. 28-5-1984, requested for extension in leave, stating therein that he was under treatment of one Dr. K.G. Shavtekar till 26-5-1984. The certificate of the said Doctor stated that the petitioner required ten days rest. In pursuance of this letter of extension of leave, the petitioner was required to report for duty on 6th June, 1984, but he did not do so. The Management, waited till 15-6-1984 and therefore, issued a show cause notice dt. 16-6-1984 and called upon him to show cause as to why his services should not be terminated on account of absence without leave. This notice was replied to by the petitioner vide letter dt. 23-6-1984 and he requested for another extension of two weeks on the ground that he was undergoing medical treatment. This letter was received by the respondent No. 3 on 28-6-1984. The petitioner did not report for duty even after the expiry of the two weeks period as mentioned in his application dt. 23-6-1984 and the issue of his absence without leave was placed before the meeting of Board of Directors on 13-8-1984. It was resolved to dispense with his service by invoking the powers under Rule 62 of the Service Rules. The petitioners neither reported for duty nor sent any leave application till the end of December, 1984.

3. Prior to issuing the impugned order of termination dt. 16-1-1985, the Management had referred the issue to the Marathwada Development Corporation Ltd. i.e. respondent No. 3 and by letter dt. 27-11-1984, the General Manager (Admn.) of the said Corporation, informed the Executive Director of the respondent No. 2 that petitioner''s services should be terminated by following the due procedure under the Rules. Pursuant to this decision, the respondent No. 2 issued a show cause notice dt. 7-12-1984 to the petitioner at his Aurangabad address as well as at the Satara address. Both these notices were sent by Registered Post Acknowledgement Due and same were returned unserved. It was made clear in these show cause notices that if the petitioner failed to report for duty within 15 days from the date of its receipt, his service would be terminated on account of remaining absent without leave. The service of the petitioner came to be terminated by the impugned order dt. 16-1-1985.

4. The respondent No. 2 has filed an affidavit in reply and opposed the petition, contending therein that Rule 62 of the Services Rules empowers the Management to terminate the service of an employee who remained absent without leave and the procedure, as required under the said Rules, was duly followed. While justifying the said action, the respondent No. 2 has also put forth the serving record stating that (a) the petitioner was issued a Show Cause Notice on 27-1-1978, calling upon him as to why he should not be removed from service for the acts of omissions and commissions on his part stated therein; (b) when he was deputed as Works Manager of Kinwat Roofing Tiles Ltd. his performance was not satisfactory and the Executive Director of the said Undertaking had informed the respondent No. 2 vide report dt. 28-8-1981 that the petitioner was not capable of shouldering the responsibilities of Works Manager and that

he should be recalled: (c) while the petitioner was working as Store Keeper at the Central Store, he was found sleeping and some parcels were lost causing losses to the Management and at the request of the petitioner a lenient view was taken and his increment for six months was stopped; (d) while the petitioner was working as Centre In-charge at Pishor, the Management allegedly noticed that he had floated a fake company in the name of M/s Rahul & Sanjay Traders and supplied machines to ladies working in the Centre. A statement of chargesheet was issued against the petitioner and the Departmental Enquiry was instituted; and (e) another charge sheet was issued against the petitioner on 14-12-1984 and a Departmental Enquiry was initiated. The respondent No. 2, thus, contended that the petitioner had a very bad service record and deserves no sympathy from this Court.

5. Rule 62 of the Services Rules reads thus:

"Except in unforeseen circumstances, an employee who remains absent after the expiry of leave shall not be entitled to pay and allowances for the period of such absence. Wilful absence from duty after the expiry of leave may entail forfeiture of employment or subject to such penalties as provided in the Rules."

We are, therefore, required to examine whether the impugned termination order dt. 16-1-1985 is in compliance with the requirements of Rule 62 (second part) and whether the petitioner was given sufficient opportunity to submit his say or defend his case before the order of termination was issued on 16-1-1985. We may mention here itself that we are not examining the constitutional validity of Rule 62 in this petition as we are satisfied that it is not necessary to do so in the instant case and leave the said issue open.

6. The learned Counsel vehemently submitted before us that the show cause notices dt. 7-12-1984 and 15-12-1984, as issued by the employer, were not received by the petitioner at any time as he was away for medical treatment and admittedly, both these notices were returned unserved to the respondent. The petitioner did not have an opportunity to submit his explanation and the employer instead of taking steps to ensure that the show cause notice was served on the petitioner by other mode of service, proceeded to issue the termination order on 16-1-1985 by purportedly invoking its powers under Rule 62. This action is illegal and in violation of the principles of natural justice as well as the protection guaranteed u/s (sic Article 311 of the Constitution urged the Counsel for the petitioner. On the other hand the respondent No. 2 employer contended that the petitioner was informed by way of a specific order not to leave the Hqrs. and sufficient steps were taken to see that the petitioner was served with the show cause notice dt. 7-12-1986 and 15-12-1985 and thus, the employer had taken sufficient steps to comply with the principles of natural justice in as much as the petitioner was offered an opportunity to submit his explanation. The respondent No. 2, therefore, urged before us that it be held that sufficient steps were taken to comply with the requirements under Rule 62 before the impugned termination order was issued. It has also been contended that the respondent No. 2 is a sick undertaking and facing precarious financial conditions as at

present.

In the case of Jai Shanker Vs. State of Rajasthan, , a similar rule was the subject matter of interpretations before the Apex Court. The said rule read thus;

"13. An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority."

While interpreting the above quoted regulation, the Apex Court held that said regulation involved a punishment for overstaying one''s leave and though the Government had a right to visit (sic) the punishment of discharge or removal from service on a person who had absented himself by overstaying his leave, but it cannot order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this was done, the delinquent will be entitled to move against the punishment and if his plea succeeds, he will not be removed. An opportunity of hearing must be given to the person against whom such an order is proposed, no matter what the regulation describes it, observed the Court.

7. The language of Rule 62, in the instant case, is almost similar to vesting a power of termination of service on the ground of overstaying of sanctioned leave. However, that does not mean that nothing further is required to be done by the employer. Removal from service is a capital punishment and the delinquent must be provided with an opportunity to submit his say, defending his case against such a proposal of termination of service. In the case of D.K. Yadav Vs. J.M.A. Industries Ltd., , the Apex Court held:

"The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily affecting the rights of the concerned person.

It is a fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice."

The Supreme Court further observed that the law must therefore be now taken to be well-settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the

civil rights or result in civil consequences would have to answer the requirements of Article 14.

8. In the instant case, though the Management had issued the show cause notice dt. 7-12-1984 and 15-12-1984 before the impugned order of termination was passed, the notices were not in fact served on the petitioner and he had no opportunity of submitting his say, opposing the proposed action of termination under Rule 62 of the Service Rules. We have been shown the original envelopes, as returned from the postal authorities and they indicate that these envelopes were returned by the postal authorities as the petitioner was not available at the respective stations. The envelopes do not indicate that they were offered to the petitioner and he refused to accept. In such circumstances, it was incumbent upon the employer to resort to an alternative mode of service either by way of pasting the notice on the house of the petitioner or by a newspaper publication. Unless the petitioner was in the knowledge of the show cause notice and the contents therein, he was deprived of an opportunity of defending his case against the proposed action of termination. The law laid down by the Apex Court in the case of Jai Shankar (supra) as well as D.K. Yadav (supra) is squarely applicable to the instant case. The petitioner was employed by a Public Sector Undertaking and the guarantee given to him under Articles 14 and 311 of the Constitution of India cannot be taken away by the employer purportedly invoking the power under Rule 62 of the Service Rules. The failure on the part of the employer to ensure the service of the show cause notice dt. 7/15-12-1984 on the petitioner renders the order of termination unsustainable in the eyes of law.

9. The question, therefore, now remains as to the relief to be granted to the petitioner. Admittedly, the petitioner has reached the age of superannuation on 31-8-1994 and therefore, there is no question of his reinstatement. The affidavit in reply filed by the respondent employer lists in detail the unsatisfactory record of service of the petitioner right from 1976 to 1984. Though this has been denied by the petitioner, the fact remains that the petitioner was transferred from place to place to provide him an opportunity for improvement, departmental enquiries were instituted though left incomplete and even when he remained absent from May, 1984 and submitted an application for extension of leave on the ground of (ill) health, it must be noted that the petitioner did not submit a single medical certificate in support of his absence upto and after 16-6-1984. Not only this, he did not submit any intimation to the employer that he could not report for duty as he was unwell or was undergoing medical treatment. It was only on receipt of the termination order on 16-1-1985, that the petitioner approached the employer vide his letter dt. 28-1-1985 and took a plea that he was absent as he was undergoing medical treatment. The petitioner was employed as Centre in-charge which was a responsible position and he was also aware of the Service Rules. The petitioner was directed not to leave the Hqrs. and under the Service Rules, leaving Hqrs. without permission is by itself an act of misconduct. In such circumstances, where the order of termination is vitiated on the grounds of violation of principles of natural justice, the employer in normal

circumstances is directed to conduct a fresh enquiry by providing sufficient opportunity to the petitioner to defend his case. However, in the instant case, the petitioner has reached the age of superannuation way back on 31-8-1994 and therefore, it would not be appropriate for this Court to direct the employer to provide a fresh opportunity of hearing to the petitioner and proceed further to take action under Rule 62 of the Service Rules. We therefore, do not propose to direct the employer to resort to such an action. The order of termination though cannot be sustained, we are not in favour of granting full salary to the petitioner, taking into consideration the peculiar facts and circumstances of this case. The respondent employer is a Public Sector Undertaking and it is by now known to all the concerned that the said undertaking is facing an eminent threat of closure. But for the orders of this Court passed in some other petitions, perhaps the said undertaking would not be existing as at present. In D.K. Yadav"s case (supra), the Supreme Court had granted the relief of 50% of backwages.

10. In the case of State of Punjab and Others Vs. Dr Harbhajan Singh Greasy, the delinquent officer was charged for being absent from duty in the emergency of attending the flood victims between 17-7-1975 to 21-7-1975 and the enquiry resulted in findings against the delinquent. Based on the said findings the disciplinary authority removed him from service which came to be challenged in the High Court. The learned Single Judge allowed the writ petition and directed reinstatement with consequential benefits. On appeal, the Division Bench confirmed the order passed by the learned Single Judge. While allowing the SLP the Supreme Court observed :

"..... It is now a well settled law that when the enquiry was found to be faulty, it could not be proper to direct reinstatement with consequential benefits. Matter requires to be remitted to the disciplinary authority to follow the procedure from the stage at which the fault was pointed out and to take action according to law. Pending enquiry, the delinquent must be deemed to be under suspension. The consequential benefits would depend upon the result of the enquiry and order passed thereon. The High Court had committed illegality in omitting to give the said direction. Since the respondent had retired from service, now no useful purpose will be served in directing to conduct enquiry afresh. However, the respondent is not entitled to the back wages as he avoided responsibility as a doctor to treat the flood victims and that was cause for the suspension.

..... Disallowance of the back wages would not stand in the way of computation of the pensioners benefits as if he had continued in service."

11. We, therefore, propose to mould the relief at the touchstone of the law laid down by the Supreme Court in the case of D.K. Yadav (supra) and State of Punjab & others (supra) and also having regard to the financial conditions of the respondent No. 2 employer which is a Public Sector Undertaking.

12. In the result we quash and set aside the impugned order of termination dt. 16-1-1985 and allow the petition partly by directing the employer (respondent No. 2) to pay

backwages to the extent of 25% (twenty five per cent) from 1st February, 1985 to 31-8-1994 and in case of any pensioners/retirement benefits available to the petitioner, the said period shall be counted as continuity in service.

13. Rule is made absolute in terms of the above order. No costs.

14. Petition partly allowed.