

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.11069 of 2013

Date of Decision: 26.02.2016

Charanjit Kumar

... Petitioner

Versus

State of Punjab and others

... Respondents

CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. K.S. Dadwal, Advocate,
for the petitioner.

Mr. Nikhil K.Chopra, DAG, Punjab.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

RAJIV NARAIN RAINA, J.

1. The challenge in this petition is to the office order dated February 05, 2013 to the extent it denies monetary benefits from the date of dismissal till the date of joining duty, which means that the petitioner will not be paid salary during the interregnum. However, the period from dismissal to reinstatement will reckon notionally for benefits of service from the date of dismissal i.e. from January 31, 2011.

2. The relevant facts briefly put are thus unfolded. The petitioner was a Cook in ESI Hospital run by the Health Department, Punjab. He was convicted in a cheque bouncing case under section 138 of the Negotiable Instruments Act, 1881 and was sentenced to undergo imprisonment for a period of one year and to pay a fine of Rs.1000/- vide judgment dated September 12, 2006 of the Judicial Magistrate. The appeal before the learned Additional Sessions Judge, Jalandhar failed on November 13, 2007.

The petitioner was taken in judicial custody and was sent to Jail.

3. Aggrieved by the rejection of the appeal, the petitioner preferred Crl. Revision No.260 of 2008 which was compromised on February 19, 2008. The conviction was upheld. However, the sentence was reduced to the period already undergone.

4. It may be noted that the department dismissed the petitioner following conviction invoking Rule 13 (1) of the Punjab Civil Services (Punishment & Appeal) Rules, 1970 (for brevity "the Rules") which enables imposition of penalty on a Government employee on the conduct which has led to his conviction on a criminal charge. Rule 13 (1) is akin to Article 311 of the Constitution of India in its protections afforded to Government servants. The dismissal order was passed on conviction simpliciter without looking to the conduct. The petitioner was not reinstated by the department on its own after the criminal proceedings came to an end on February 19, 2008. The dismissal took place on January 31, 2011 after almost 3 years of the finalization of the criminal proceedings.

5. Denied reinstatement, the petitioner approached this Court in CWP 5098 of 2011. The ground taken was that the dismissal order was not based on the conduct which led to the conviction on a criminal charge and which conviction did not involve moral turpitude. The disciplinary authority had not considered this aspect and had therefore violated the mandate in Rule 13 (1) of the Rules. The Court agreed that the infirmity existed in the order which was incurable and, therefore, set aside the dismissal order by granting liberty to the respondents to consider the matter afresh and pass an order in terms of Rule 13 (1) of the Rules. Meaning thereby, for the competent authority to examine the conduct which led to the conviction

before a fresh decision was made. The writ petition was disposed of on November 05, 2012.

6. The directions of the Court to re-consider the matter were obeyed and the fresh office order was passed on February 05, 2013 which is a subject matter of challenge in this petition to the extent indicated above. The Director Health Services (SI), Punjab being the disciplinary authority made aware of the legal position realized that a cheque bouncing case does not involve moral turpitude. The DHS also realized that while dismissing the petitioner from service his conduct was not taken into account since the petitioner had been dismissed from Government service only on the basis of conviction in a criminal case. The authority re-examined the judgment of the Judicial Magistrate, Jalandhar and relied on the opinion tendered by the learned Advocate General, Punjab to Government that the case does not fall in cases involving moral turpitude. There is authority to suggest that a cheque bouncing case ending in conviction does not involve moral turpitude. See on this proposition of law, relied upon by Mr. Dadwal: **Kerala State Road Transport Corpn. v. S. Abdul Latheef**, 2005 (4) RCR (Criminal) 956 : 2005 (4) SCT 622 and **C. Saseendran Nair v. General Manager, State Bank of Travancore, Thiruvananthapuram**, 1997 (1) SCT 321 : 1997 (1) RCR (Criminal) 298. Consequently, the dismissal order was withdrawn which had the legal effect that the order had never been passed and the reinstatement would go back to the date of dismissal i.e. on January 31, 2011. The only thing that remained in dispute was the direction of the punishing authority in the impugned order denying monetary benefits from the date of dismissal to the date of joining duty except what may be notionally due to him for the period.

7. The legal position is well settled that in a case of conviction on a criminal charge and acquittal by superior court, reinstatement does not follow automatically. The employer is still left with the discretion whether to reinstate or not. It is another matter that the petitioner has been reinstated to service after the exercise of re-examination of the case on directions of the Court was done. However, the departure from normal rule in this case is that the petitioner has not been acquitted of the charge. On the other hand, the conviction has been upheld and the sentence has been reduced to the period undergone. Ordinarily the stigma of conviction holds the field in service law jurisprudence to the detriment of the employee. The petitioner has not come out of the trial untarnished. In such a situation, back wages would not follow, by necessary implication, on account of the nature of the order passed by this Court on a compromise reached on payment of the defaulted amount to the complainant. It may be noted that the charge was based on a private dispute between the petitioner and 3rd party and had nothing to do with the employment in the Health Department.

8. It appears beyond dispute that the petitioner has no right to back wages prior to January 31, 2011 the date of dismissal from service because the cook got stewed in his own broth. Besides, denial of back wages for the said period is for the reason of no-fault in employer who is denied labour for which it pays salary to employee. The principle of 'no work, no pay' applies in such situations. The legal position after January 31, 2011 appears to this Court to be that the disentitlement to back wages would continue till November 05, 2012 when for the first time the Court declared the rights of the petitioner holding that the order of dismissal was illegal inasmuch as it was passed without going into the conduct which led to the conviction. On

November 05, 2012 the Court set aside the order in express words which meant that the effect of the dismissal order was virtually obliterated and in law it would have to be assumed that it was not passed. While setting aside the dismissal order the Court gave liberty to the authorities to consider the matter afresh and pass an order in accordance with law by taking into account the conduct which led to the conviction. The re-consideration was to take place within three months from the date of the receipt of the order. Within the time frame, the impugned order was passed on February 05, 2013.

9. The Court also clarified in its order that in case and till such time the fresh orders are not passed, the petitioner shall be reinstated in service but shall not be paid any arrears of salary. The relief as regards the continuity of service, arrears of salary etc. were made to depend on the outcome of the fresh consideration when this Court made the order which ordered reinstatement but kept benefits flowing therefrom to be decided by the competent authority. For reinstatement, no date was fixed and it would have to be read as forthwith. Therefore, the petitioner would be entitled to be reinstated on the date when the order was passed since reinstatement did not depend on the event of supply of certified copy since the order was passed in the presence of the State of Punjab represented by its Additional Advocate General which amounts to notice to the State on the date of the order.

10. The sole controversy left for determination is whether the petitioner is entitled to salary from January 31, 2011 to February 05, 2013 when the impugned order was passed withdrawing the previous order.

11. In the considered view of this Court, the competent authority had

no authority to withdraw the order of dismissal which had been set aside by the Court and the observation in the impugned order would have to be read down in terms of the order of this Court dated November 05, 2012 setting aside the dismissal order. What became non-existent on November 05, 2012 left nothing to be withdrawn and, therefore, the contention of Mr. Dadwal appears to this Court to be the correct legal position that the petitioner will be entitled to back wages from January 31, 2011 to February 05, 2013. The actual joining of the petitioner on the post of Cook becomes immaterial since all that the competent authority was called upon to do vide orders of this Court dated November 05, 2012 was to consider the question of arrears of salary and continuity of service and whether the conduct justified punishment. When this Court spoke of arrears of salary they would have to be read in conformity with the law flowing from the direction setting aside the dismissal order to the extent that conduct which led to conviction was not considered. I may record that the order of dismissal was not set aside in toto but to the extent of liberty granted. It appears to this Court very difficult to separate a dismissal order into two parts, one that it should hold good till re-consideration by the competent authority and at the same time declaring that its foundation was bad because of non-consideration of the essential ingredient/condition precedent in Rule 13 (1) of the Rules. The legal value of the dismissal order stands considerably watered down and appears to become non-existent in a matter involving the conviction in a cheque bouncing case which does not involve element of moral turpitude. The competent authority agrees in the impugned order that the conviction does not involve moral turpitude. If that is so, then the base of the dismissal order stands removed without Court intervention.

12. Therefore, when the competent authority withdrew the dismissal order, it did not mean that the dismissal order remained operative after November 05, 2012 which inter-linked dismissal with fresh consideration on the relevant point to which even the petitioner had no objection as recorded in the order. It appears certain to this Court that for the present, the dismissal order has to be treated as *void ab initio*. If it is void then it would be taken in law never to have been passed. If it was never passed then all consequential benefits would ordinarily flow except as are barred by law or legal principles evolved by courts in the matter of award of back wages on reinstatement after conviction. This takes us to the question of how to deal with the period January 31, 2011 to February 05, 2013 qua monetary benefits. Back wages prior to January 31, 2011 have to be denied in view of the law in **Ranchhodji Chaturji Thakore v. Superintendent Engineer, Gujarat Electricity Board, Himmatnagar (Gujarat)**, (1996) 11 SCC 603; **Union of India v. Jaipal Singh**, (2004) 1 SCC 121; **Banshi Dhar v. State of Rajasthan**, (2007) 1 SCC 324 and **SBI v. Mohd Abdul Rahim**, (2013) 11 SCC 67.

13. The narrow issue which remains is whether the competent authority was justified in covering the period of no back wages till the date of joining which could have taken place only after February 05, 2013. However, that date is not ascertainable in the paper-book but the Court would take it that according to the department itself the joining should have come either on February 05, 2013 itself or the next working day. The Court has no doubt that the petitioner is not entitled to back wages after conviction on September 12, 2006 till November 13, 2007 when the conviction was upheld and the petitioner was taken into judicial custody. The period of

custody is not known. The petitioner would also not have a right to back wages from November 13, 2007 when the Sessions Court upheld the conviction till February 19, 2008 when the matter was compromised in criminal revision.

14. The petitioner would also not be entitled to back wages from February 19, 2008 till January 31, 2011 when the petitioner was dismissed from service, for the reason that for about three years he made no demand for reinstatement. The department was under no legal obligation to automatically offer reinstatement to the petitioner unless a request was made by him which could be considered in accordance with law. No evidence has been placed on the file to show any representation was made by the petitioner claiming reinstatement etc. The effect of the dismissal order continued. It was final as far as the petitioner was concerned and he would have a right not to agitate the matter further unless he questioned the validity of the order in a court of law. This is how service law works. He approached Court for the first time in CWP No.5098 of 2011 when the order dated November 05, 2012 was passed which is discussed above at considerable length. However, the rights of the petitioner are to be considered and declared firstly, from January 31, 2011 when the dismissal order was passed and then from November 05, 2012. To put it in other words whether petitioner is entitled to back wages from January 31, 2011 till February 05, 2013 when the dismissal order was withdrawn or from November 05, 2012 to February 05, 2013. There is no doubt that the dismissal order dated January 31, 2011 is seriously flawed being in abject violation of Rule 13 (1) of the Rules and, therefore, no premium can be given to the Government after it passed an illegal order which was declared

bad for the first time on November 05, 2012 through court intervention.

15. In these circumstances, this Court would commend the view that the petitioner would be entitled at least to back wages from January 31, 2011 till February 05, 2013 notwithstanding the date of joining which was not in control of the petitioner unless given liberty to rejoin service. It is well settled that a declaration of law takes place when the cause of action accrues. The cause of action accrued for the first time to the petitioner regarding back wages when he was dismissed from service on January 31, 2011. However, he would have no right to seek back wages from September 12, 2006 to January 31, 2011 for a variety of reasons discussed above. To achieve the result, as contemplated in terms of relief admissible to petitioner a legal fiction would require to be created from January 31, 2011 onward since the order was *ab initio void* and non est but good till it was not set aside by court or withdrawn by Government irrespective of litigation, launched or not. The department was under an obligation not to leave any impurity in the official record which may be declared by issue of writ of certiorari legally bad and inoperable, but the decision coming later, as always in such circumstances. Hence, the legal fiction would have to be carried to its logical conclusion and the petitioner held entitled at least to back wages from January 31, 2011 to February 05, 2013 and thereafter.

16. To the extent indicated above, the writ petition is allowed. The impugned order dated February 05, 2013 is set aside to the extent it denies monetary benefits from the date of dismissal till the date of joining duty. A writ of certiorari is issued quashing that part of the impugned order. The petitioner is held entitled to arrears of salary for the period January 31, 2011 to February 05, 2013. The arrears of back wages be calculated as per this

order and paid accordingly to the petitioner within a period of two months from the date of supply of a copy of this order. No costs.

(RAJIV NARAIN RAINA)
JUDGE

26.02.2016
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