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Court : Mumbai Goa

Decided On : Mar-25-2013

Judge : A.P. Lavande & U.V. Bakre

Appeal No. : Writ Petition No. 53 of 2012

Appellant : S. Ananthasayanam

Respondent : M/S. Goa Shipyard Limited and Others

Judgement :

U.V. Bakre, J.

1. Rule, returnable forthwith. Learned Counsel for the respondents waive service of Rule. By consent, taken up for hearing forthwith.

2. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction thereby quashing the Memorandum/Article of Charge dated 7/02/2011 and for a declaration that termination of the petitioner by impugned letter dated 01/08/2012 is null and void.

3. The petitioner joined respondent no.1 as Deputy General Manager (Finance), [redesigned as Additional General Manager (Finance)] on 3/7/1996 and served till 13/8/2001, after which he was appointed as General Manager (Finance) of Respondent no.1, through open advertisement on 14/8/2001 and he served as

such till 4/11/2003. Upon request made by the petitioner by letter dated 3/11/2003 to the respondent no.1 for permission to relinquish from the post of GM (Finance), he was informed by Memorandum dated 27/11/2003 that he has been relinquished and accordingly on 4/11/2003, he gave up the post of GM (Finance). At the time of relinquishing the said post, the petitioner opted to settle all retirement dues on the expiry of tenure as the Director (Finance). Thereafter, vide letter dated 22/11/2004, the petitioner came to be appointed as Director (Finance) by Respondent no. 2 on selection by Public Enterprises Selection Board (PESB) and pursuant to the sanction granted by the President of India. This appointment was initially for a period of five years w.e.f. 05/11/2003. As per clause (i) of the appointment letter, the appointment could be terminated during the tenure, either by giving 3 months' notice or on payment of 3 months' salary, in lieu thereof. The appointment further stated that after expiry of the first year, the performance of the petitioner will be reviewed to enable the Government to take a decision regarding continuance or otherwise in the course of balance period of tenure. In the meanwhile, he was confirmed in that service, for the balance period of tenure, by letter dated 13/4/2005.

4. By letter dated 30/07/2005, an explanation was sought by respondent no.1 from the petitioner in respect of certain acts of commission and omission and the allegations were:- that conveyance expenditure was claimed, though official transport was provided for and expenditure was also claimed without production of any bills; that claim for reimbursement towards snacks was made for which there was no provision in the rules; that the petitioner had gone on a pilgrimage by hired taxi provided by the Company; and that the petitioner had traveled to his native place at Chennai on the ground 'For mother medical help' without prior permission; and had claimed out of pocket expenses without any supporting documents. By letter dated 12/8/2005, the petitioner submitted his clarification to the Respondent no.1. However, the Chairman and Managing Director (CMD), by his note dated 21/11/2005, sought for petitioners reply and, accordingly, by letter dated 1/12/2005, the petitioner submitted his reply to him. In the meantime, the said CMD referred the matter to the Internal Audit section for reconsideration along with clarification dated 1/12/2005 given by the petitioner and the internal Audit section prepared a report dated 23/1/2006 and forwarded the same to the CMD of

Respondent no.1. The tenure of petitioner was due to expire on 04/11/2008. The Respondent no. 2 by letter dated 3/11/2008, informed the Respondent no.1 that as per the instructions, the Administrative Ministry cannot suo moto terminate the tenure of the full time Board Level incumbent immediately on expiry of tenure unless a joint appraisal is carried out by the PESB and the concerned administrative Ministry and final decision is taken on the joint appraisal report with approval of the Appointment Committee of the Cabinet (ACC). On 4/2/2009, Respondent no. 2 informed the Respondent no.1 that the ACC has approved the proposal for ad hoc extension of tenure of petitioner by three months beyond 04/11/2008 up to 04/02/2009. The petitioner was further informed that Respondent no. 2 with approval of Hon'ble Ministry of Defence, has also sought approval of the competent authority for regular extension of the petitioner in the tenure of Director (Finance) of the Respondent no. 1 up to 31/07/2012 i.e. the date of superannuation of the petitioner. Accordingly, by letter dated 8/4/2009, the petitioner was informed by Respondent no. 2 that his tenure has been extended from 04/11/2008 to 31/7/2012 i.e. the date of superannuation on attaining the age of 60 years or until further orders, whichever event occurs earlier. The said letter further stated that the terms and conditions of petitioner will remain the same, as provided in the letter of appointment dated 22/11/2004. On 7/2/2011, a Memorandum of Article of Charge came to be served on the petitioner by Respondent no. 2 informing him about initiation of an inquiry under Rule 30 of Goa Shipyard Ltd. Officers' and Supervisors' Conduct, Discipline and Appeal Rules, 1979 (GSL, CDA, Rules) and the petitioner was directed to submit his reply. On 1/10/2011, the petitioner submitted reply thereby denying all the charges and inter alia contending that disciplinary proceedings could not have been initiated against him by respondent no. 2 in respect of alleged charges of misconduct committed while in service with Respondent no.1 and that the second contractual tenure of the petitioner was a fresh appointment. The petitioner filed the petition thereby challenging the said Memorandum/Articles of Charge dated 7/2/2011.

5. During the pendency of the petition, an Inquiry Officer was appointed to inquire into the charges. On 15/09/2011, the proposal for non-confirmation of the petitioner was sent to the competent authority. By letter dated 01/08/2012 addressed to the CMD of Respondent no.1, by the respondent no. 2, the approval

of competent authority for non-confirmation of the petitioner as Director (Finance), GSL, Goa was conveyed by Government of India, Ministry Of Defence (MOD). It was further conveyed that no separate action was necessary for termination of the petitioner as his tenure was due to expire on 31/7/2012.

6. According to the petitioner, he received the said letter on 10/8/2012 and that the said non-confirmation amounts to discontinuation of service by way of termination. He says that the said termination is arbitrary and illegal. He further says that Rules 38(A) and 38(A)(ii) of GSL, CDA, Rules, are not applicable to him. The petitioner, therefore, alleges that disciplinary proceedings initiated as against him cannot continue on the expiry of contractual period and, therefore, the said disciplinary proceedings initiated by charge sheet dated 07/02/2012 deserves to be quashed and set aside.

7. By way of reply filed on behalf of respondents no. 2 to 4, the respondent no. 2, in brief, stated as under:

The petitioner was appointed as Director (Finance), GSL w.e.f. 5.11.2003 for a period of five years and the terms and conditions were mentioned in the appointment letter dated 22/11/2004. The term of petitioner was further extended from 5/11/2008 to 31/7/2012 i.e. the date of his superannuation, with the approval of the competent authority. The guidelines dated 11/10/1999 issued by PESB provided that the grant of second term is a fresh contract and hence, if the duration of the second term is more than three years, then, after expiry of the period of one year, the performance of Board level appointees is required to be reviewed to enable the Government to take a view regarding continuation or otherwise for the balance period of tenure. On 28/12/2010, the PESB, after taking into account the totality of circumstances including oral submissions of the petitioner as well as his performance as reflected in the SPR and inputs given by MOD and CMD, GSL, recommended confirmation of tenure of the petitioner as Director (Finance), GSL beyond 4/11/2009. The PESB also intimated to obtain the vigilance clearance in respect of the petitioner. On the advice of the Central Vigilance Commission (CVC), the MOD issued the Charge Memo dated 7/2/2011 to the petitioner for major penalty proceedings for his gross misconduct, as per the

procedure which has been laid down. The said charge is grave in nature and with the approval of the disciplinary authority it was decided to request the CVC to designate one of their officers as Inquiry Officer. The petitioner has denied the charges. The case of the petitioner is not of termination of service, which could have been done only on completion of inquiry. The petitioners case is a case of denial of confirmation as the officer is not cleared from vigilance angle. The proposal for non-confirmation of the petitioner to the post of Director (Finance) of GSL was sent to the ACC. The petitioner was relinquished from the post of GM (Finance) w.e.f. 4/11/2003 and again he was appointed as Director (Finance) w.e.f. 5/11/2003 and, therefore, he was in service of GSL continuously and, therefore, GSL CDA, Rules are applicable to him and the charge sheet has been issued as per the said rules. Subsequently, as per the letter dated 1/8/2012, the petitioner was denied confirmation. Hence, the petition is liable to be dismissed.

8. Mr. Sardesai, learned counsel appearing on behalf of the petitioner, submitted that the only question for determination is whether the disciplinary inquiry, against the petitioner, can continue or not. He invited our attention to the letter dated 1/8/2012 conveying approval for non-confirmation, which specifically states that no separate action is required for termination, at this stage as petitioner's tenure is due to expire on 31/7/2012. He, therefore, submitted that the said discontinuation in service is nothing but termination and hence there cannot be a question of continuation of the inquiry. He further contended that the termination of petitioner, styled as non-confirmation is based on the Vigilance report and the allegations in the charge sheet are also based on the same Vigilance report. According to him, therefore, since the termination has been made during the tenure of departmental proceedings initiated pursuant to the charge sheet dated 7/2/2011, such termination will amount to termination by way of punishment for commission of acts or omission spelt out in the Memorandum of Charge dated 7/2/2011, which will amount to depriving the petitioner of employment without following due process of law and by circumventing the provisions of the GSL, CDA, Rules and would amount to double punishment. Learned Counsel further submitted that Rules 38(A) and 38(A)(ii) of the GSL, CDA, Rules are applicable only to those employees who retire while in service and not to those contractual employees who either are terminated on account of non-confirmation or whose contractual period

expires due to discontinuation of the contract on reaching the age of superannuation. He urged that the said rules are not applicable to the petitioner since his services have been terminated even before reaching the age of retirement and in any event there is discontinuation of service, as per the contract.

9. Learned Counsel appearing on behalf of the petitioner pointed out that the approval of non-confirmation was conveyed to the petitioner after the date of his superannuation. He submitted that the petitioner being a contractual employee, there was no question of superannuation. He also submitted that review of performance was not permissible if the second tenure of the petitioner is treated as extension of the first appointment. Otherwise, such review of performance was required to be done on the expiry of the first year of his tenure starting from 4/11/2008 to 31/7/2012. Learned Counsel, therefore contended such review which was done after the expiry of the contractual period is otherwise contrary to the letter of appointment dated 8/04/2010 and hence the termination of petitioner by way of non-confirmation is illegal. His next submission is that the petitioner was not in the employment of the respondent no.1, but his new employer was the respondent no. 2. He invited our attention to the Memo of Charge and more particularly, Article II, which pertains to the charge for the period from January 1998 to December 2002, when the petitioner was not in the employment of the respondent no. 2. Learned counsel submitted that in such circumstances, the respondent no. 2 cannot conduct the inquiry on such charge. It is submitted that the main grievance of the petitioner is only regarding the disciplinary proceedings being still kept pending, which according to him cannot continue upon the expiry of the contractual period. He, therefore, urged that the said Memorandum/Article of Charge dated 7/2/2011 is liable to be quashed and set aside and therefore, the petition be allowed. Learned Counsel relied upon *Bhagirathi Jena Vs. Board Of Directors, O.S.F.C. And Ors*, [(1999) 3 SCC 666]; and *Management of Karnataka State Transport Corporation Vs. M. Boraiah and Ors.* (AIR 1983 SC 1320).

10. On the other hand, Mr. Amonkar, learned Central Government Standing Counsel appearing on behalf of the respondents no. 2 to 4 submitted that the petitioner has admitted in the writ petition that GSL, CDA, Rules are applicable to him. He invited our attention to the appointment letter dated 22/11/2004, wherein it

is mentioned that: (a)- the Conduct, Discipline and Appeal Rules framed by PSE in respect of their non-workmen category of staff would also mutatis mutandis apply to the petitioner with the modification that the Disciplinary Authority in his case would be the President; and (b)- the Government also reserves the right not to accept his resignation if the circumstances so warrant, i.e. the disciplinary proceedings are pending or a decision has been taken by the competent authority to issue a charge sheet to him. Learned counsel further submitted that even otherwise, the respondent no. 1 is the Government of India Undertaking and as from 5/11/2003, in respect of the petitioner only the employer had changed and instead of respondent no.1, the employer was respondent no. 2. The learned counsel further submitted that the petitioner has taken all the defences which he has contended in this petition, in the said disciplinary proceedings and the inquiry officer would be looking into them. He submitted that though the petitioner was discontinued, the inquiry which had already started can continue. He invited our attention to Rule 38A and Rule 38(A) (ii) of the GSA, CDA Rules, which according to him permit continuance of disciplinary proceedings even after discontinuance of service of the petitioner. Learned counsel submitted that case of the petitioner is of discontinuation and it cannot be called as termination. He submitted that since the inquiry has already commenced as from 7/2/2011, it is bound to continue. He, therefore, urged that there is no substance in the petition and the same is liable to be rejected.

11. We have given due consideration to the rival submissions of the learned Counsel for both the parties and in our view, the contentions of learned Counsel for the petitioner, cannot be accepted.

12. Admittedly, the petitioner relinquished his post of GM (Finance) in the establishment of Respondent no.1, as from 4/11/2003, at his own will and from 5/11/2003, he started working as Director (Finance) of respondent no. 1. The sanction of President of India to the appointment of the petitioner to the said post was conveyed to the CMD of GSL on 22/11/2004. This was a contractual appointment. The said letter dated 22/11/2004 specifies the terms and conditions of appointment. The period of appointment was 5 years w.e.f. 5/11/2003, in the first instance or till the age of superannuation, whichever is earlier, and in

accordance with the provisions of the Companies Act. The appointment, however, could have been terminated during the said period by either side on 3 months' notice or on payment of 3 months' salary, in lieu thereof. The condition no.(xiii)(a) shows that the Conduct, Discipline and Appeal Rules framed by the P.S.E. in respect of their own workmen category of staff would also mutatis mutandis apply to the petitioner with the modification that the Disciplinary Authority in his case would be the President. Even, the petitioner has admitted in paragraph 21(C) of the petition that the GSL, CDA Rules were applicable to him, at least during his first tenure till 04/11/2008. The said Rules 38A and 38(A) (ii) read as under :

Rule 38A :

i) Disciplinary proceedings, if instituted while the Officer/Supervisor was in service whether before his retirement or during his reemployment, shall, after the final retirement of the officer, be deemed to be proceedings and shall be continued and concluded by the authority by which it was commenced in the same manner as if the Officer/Supervisor had continued in service.

Rule 38(A)(ii):

ii) The Supervisor/Officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The concerned officer/supervisor will not receive any pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of retirement benefits till the proceedings are completed and final order is passed thereon except his own contribution to CPF.

13. Whether the second tenure of the petitioner from 05/11/2008 to 31/07/2012 was extension or fresh appointment is not of much relevance as the same was admittedly contractual reemployment for particular period as specified in the letter dated 08/04/2009. Though the proposal for non-confirmation of petitioner was sent to the competent authority on 15/9/2011, the approval for the same was not conveyed on or before 31/7/2012. Hence the case of the petitioner would be of

discontinuance from contractual service as from 31/07/2012. Merely because it is mentioned in the letter dated 01/08/2012 that the approval of competent authority for non-confirmation of petitioner is conveyed and that no separate action for termination at this stage is necessary as the tenure of petitioner is due to expire on 31/7/2012, it need not be said that the petitioner has been terminated from service, as a punishment. Similarly even if the said letter was received by the petitioner on 10/08/2012, as alleged by the petitioner, that would not make any difference. It is nobody's case that the petitioner was stopped from working prior to 31/07/2012 or had continued to work after 31/07/2012. As per the terms and conditions of his re-employment, vide letter dated 08/04/2009, the petitioner discontinued working as from 31/07/2012. There is no question of Confirmation or non-confirmation after 31/07/2012. What is relevant is that the GSL, CDA Rules providing for continuation of disciplinary proceedings after the expiry of tenure, were still applicable to him. By letter dated 13/4/2005, the petitioner was confirmed as Director (Finance) till his balance period of tenure i.e. till 4/11/2008. By letter dated 04/02/2009, the respondent no. 2 informed the CMD of respondent no. 1 that the ACC has approved the proposal for ad-hoc extension of tenure of petitioner as Director(Finance), GSL by 3 months beyond 04/11/2008 upto 04/02/2009. Thereafter, by letter dated 08/04/2009, the respondent no. 2 informed the CMD of respondent no. 1 that the President is pleased to extend the tenure of petitioner as Director (Finance), of GSL, Goa beyond 04/11/2008 to 31/7/2012 i.e. the date of his superannuation on attaining the age of 60 years or until further orders, whichever event occurs earlier. It is specifically mentioned in this letter that the terms and conditions of service of petitioner as Director(Finance) shall remain the same as issued vide letter dated 22/11/2004. Thus, undoubtedly, there was continuation of contractual service of petitioner after 04/11/2008, whether it be called as extension or fresh contractual appointment. The GSL, CDA, Rules were applicable to the petitioner even during his extended period, since the same is specifically mentioned in the letter dated 08/04/2012. Even if the said letter dated 01/08/2012 had not been issued, then also the petitioner had to go home as from 31/7/2012. Merely because, the said letter dated 01/08/2012 says that the approval of the competent authority for non-confirmation of the petitioner is conveyed, however, the same is redundant because as on 31/7/2012, the

petitioner's contractual tenure itself had come to an end. It has been otherwise stated in the letter dated 01/08/2012 that no separate action seems to be necessary for termination as the petitioner's tenure is due to expire on 31/7/2012. Accordingly, the tenure of the petitioner expired on 31/7/2012.

14. In the case of Bhagirathi Jena(supra), relied upon by the learned counsel appearing on behalf of the petitioner, the disciplinary proceedings were initiated against the appellant under Regulation 44 of the Orissa Financial State Corporation Staff Regulations, 1975, prior to his retirement on superannuation, and the inquiry could not be completed against him till his retirement on 30/06/1995. He was relieved on 01/7/1995 without prejudice to the claims of the Corporation. The Hon'ble Apex Court held as follows:

No specific provision exists in the Orissa Financial State Corporation Staff Regulations, 1975 for deducting any amount from the provident fund consequent to any misconduct determined in departmental inquiry, nor is there any provision for continuance of departmental inquiry after superannuation. In the absence of any such provisions, it must be held that the respondent-Corporation had no legal authority to make any reduction in the appellant's retiral benefits. There is also no provision for conducting a disciplinary inquiry after the appellant's retirement, nor is there any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30/6/1995, there was no authority vested in the corporation for continuing departmental inquiry even for the purpose of imposing any reduction in retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the inquiry had lapsed and the appellant was entitled to full retiral benefits.

15. The petitioner cannot be stated to have retired on superannuation. His appointment being on contractual basis, there cannot be superannuation. The period of employment would be as per the contract. Though the initial contract period, inter alia, was for 5 years from 04/11/2003, however, the extension was not granted for 5 years from 04/11/2008, but it was restricted. The extension was given from 4/11/2008 to 31/7/2012, i.e. till the date of his superannuation on

attaining the age of 60 years or until further orders, whichever event occurs earlier. The same does not mean that since the petitioner continued till 31/7/2012, he should be deemed to have retired on superannuation. The said extension only fixed the outer limit of contractual appointment till 31/7/2012, or until further order, whichever occurs earlier. Even if the letter dated 1/8/2012 was not issued, the petitioner's tenure would have ended on 31/7/2012, due to efflux of the period of contract. In the letter dated 08/04/2009, conveying approval of the President for extension, it was stated that the terms and conditions of the petitioner will remain the same as provided in the letter of appointment dated 22/11/2004. Thus, Rules 38A and 38(A)(ii) are still applicable to the petitioner and the disciplinary inquiry can continue, in terms thereof. This letter shows that approval for non-confirmation of the petitioner was taken prior to the date of superannuation of the petitioner. However, since the last date of contractual period of the petitioner already arrived, the question of discontinuance from service on account of non-confirmation as from 31/7/2012 did not arise. In the circumstances above, the judgment of the Apex Court in the case of Bhagirathi Jena (supra) is not applicable to the present case.

16. The case of M. Boraiah and Ors(supra), which pertains to the question whether termination of employee during probation amounts to retrenchment, is also not applicable to the case at hand.

17. In view of the rules which are applicable to the petitioner, the disciplinary proceedings which have commenced against the petitioner can continue even after his discontinuation from service.

18. It is true that the memorandum proposing to hold inquiry has been issued by the respondent no. 2 and Inquiry Officer has also been appointed by respondent no. 2. Article II of Charge framed against petitioner pertains to the period from January 1998 to December 2002, while he was functioning as AGM(Finance), GM(Finance). During the entire period of regular service and contractual service, the petitioner was working for the respondent no. 1. The respondent no.1 is a Public Sector Undertaking under the administrative control of department of Defence Production, Ministry of Defence, Government of India. There are charges

against the petitioner which pertain to the contractual period also. The question whether acts of commission and omission alleged to have been committed by the petitioner during the period of regular service, in terms of Article II, can be inquired into or not, is a question to be decided by the Disciplinary Authority. As submitted by learned Central Government Standing Counsel, and agreed by learned Counsel for the petitioner, all the defences which the petitioner has taken in this petition have also been taken by him in the disciplinary proceedings. All the contentions of the petitioner are kept open. As submitted by Mr. Usgaonkar, learned Counsel for the respondent no. 1, an appeal is provided under Rule 35 of GSL, CDA, Rules against an order imposing any of the penalties specified in Rule 27.

19. In view of the above, the petition is devoid of merits and hence is dismissed.

20. Rule stands discharged, with no order as to costs.

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