

PETITIONER:
STATE OF ANDHRA PRADESH & ANR.

Vs.

RESPONDENT:
DR. RAHIMUDDIN KAMAL

DATE OF JUDGMENT: 07/02/1997

BENCH:
J.S. VERMA, S.P. KURDUKAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.P. KURDUKAR, J.

This civil appeal by Special Leave is filed by the State of Andhra Pradesh and another challenging the legality and correctness of the judgment and order dated August 7, 1984 passed by the Andhra Pradesh Administrative Tribunal in review representation being Misc. Petition No. 322 of 1984 in Representation Petition No. 142 of 1978 filed by the respondent.

2. A few facts relevant for the disposal of this appeal may be briefly summarised as under:-

The respondent was appointed on 18th April, 1945 as Tehsildar in revenue department of the erstwhile State of Hyderabad. On re-organization of the States on 1st November, 1956, the respondent was allotted State of Andhra Pradesh. In the year 1957, he was promoted as Deputy Collector.

3. While serving as the Deputy Collector, the respondent applied for the granted leave from 11th June, 1963 to 10th June, 1968. While on leave, on 14th November, 1964, the respondent sought pre-mature retirement. The Board of Revenue informed the respondent that the govt. servant in superior service governed by old pension rules had the option to retire from service only after completion of 25 years of qualified service. While sanctioning the last spell of extension of leave from 1st January, 1968 to 10th June, 1968, the Board of Revenue informed the respondent that he would cease to be a government servant from 11th June, 1968 as per Rule 29 of the Hyderabad Civil Service Rules (for short 'Rules') according to which a government servant after five years of continuous absence from duty elsewhere than on foreign service ceases to be a government servant. Despite such communication, the respondent did not join the service on 11th June, 1968 but sought permission on 19th June, 1968 to serve in a private company started by him and his wife. According to the appellants, the respondent thus had not only violated Rule 29 of the Rules by remaining absent for more than five years but also contravened Rules 10, 11 and 12 of the Andhra Pradesh Civil Services Conduct Rules, 1964. In the meantime, the Government of Andhra Pradesh on 28th August, 1968 appointed the Secretary to the Board of Revenue

as enquiry officer under Rule 19(2)(a) of A.P. Civil Services (Classification, Control and Appeal) Rules, 1963. On November 24, 1970, a charge sheet came to be served on the respondent. The respondent submitted his reply on 28th December, 1970 but did not ask for any oral inquiry. On perusal of the reply, the Authority found that the explanation given by the respondent was not satisfactory and, therefore, on 31st March, 1972, a show cause notice was issued to him (respondent) indicating the proposed punishment of removal from service. Vide order dated 23rd September, 1977, the respondent was removed from service. By another order dated 13th December, 1977, the period between 11th June, 1968 to 23rd September, 1977 was treated as 'dies non.' It is relevant to mention that till the order of removal from the service was made, the respondent continued to remain absent. In 1978, the respondent filed representation petition against the orders dated 23rd September, 1977 and 13th December, 1977 before the Andhra Pradesh Administrative Tribunal. After hearing the parties, the A.P. Administrative Tribunal vide its order dated June 10, 1984 dismissed the representation petition. The respondent thereafter filed review representation Misc. Petition No. 322 of 1984 before the said Tribunal. The A.P. Administrative Tribunal after hearing the review petitioner and the respondent vide its order dated 7th August, 1984 set aside the order of removal of the respondent passed on 23rd September, 1977 though upheld the order dated 13th December, 1977 on the ground that prior to the issue of order dated 23rd September, 1977, the Andhra Pradesh Vigilance Commission was not consulted by the Government as required by the then existing Rule 4(2) of A.P. Civil Services (Disciplinary Proceedings Tribunal) Rules.

4. From the record, it is found that the Government of Andhra Pradesh on 31st October, 1984 issued G.O.M.S. No. 1618 whereby it annulled the orders of the Tribunal dated August 7, 1984 passed in review representation Misc. Petition No. 322 of 1984. This order was issued by the Government of Andhra Pradesh in exercise of its powers under Article 371-D(5) of the Constitution of India. Aggrieved by the order dated 31st October, 1984, the respondent filed writ petition in the High Court of Andhra Pradesh and the High Court vide its order dated 12th February, 1987 relying upon the decision of this Court in P. Sambamurthy Vs. State of Andhra Pradesh, 1987(1) APLJ 13, allowed the writ petition and set aside the order dated 31st October, 1984 passed by the Government of Andhra Pradesh. The Government of Andhra Pradesh feeling aggrieved by the order passed by the Andhra Pradesh Administrative Tribunal on August 7, 1984 has filed this appeal challenging the legality and correctness thereof.

5. The Andhra Pradesh Administrative Tribunal after considering to Rule 2(b) of the A.P. Civil Services (Disciplinary Proceedings Tribunal) Rules (for short 'DPT Rules') which defines the "misconduct" and on reconsideration of Rule 4 opined that the charges levelled against the respondent relate to the misconduct as defined under Rule 2(b) *ibid* and since the Government of Andhra Pradesh under sub rule (2) of Rules 4, as it then stood, did not consult the Andhra Pradesh Vigilance Commission before passing the order of removal on 23rd September, 1977, the said order is rendered illegal. However, the Andhra Pradesh Administrative Tribunal did not disturb the order dated 13th December, 1977 as regards treating the period between 11th June, 1968 to 23rd September, 1977 as "dies non." The only question, therefore, that falls for our consideration is as

to whether Andhra Pradesh Administrative Tribunal was right in setting aside the order of removal of the respondent passed on 23rd September, 1977 solely on the ground that before passing this order, the Government of Andhra Pradesh did not consult the Vigilance Commission. In order to appreciate the rival contentions, it is necessary to reproduce Rule 4 of DPT Rules which reads as under:-

"4.(1) In every case referred to in sub-rule (1) or (2) of rule 3, on completion of investigation, the anti corruption department or other departmental authority concerned shall submit a report of the case to the Government.

(2) The Government shall after examining such records and after consulting the Heads of Department concerned, if necessary, decide whether the case shall be tried in a court of law or inquired into by the Tribunal or departmental authority. But before taking a decision, the Government shall consult the Andhra Pradesh Vigilance Commission.

(3) If the Government decide that the case shall be inquired into by the Tribunal, they shall send the records relating thereto to the Tribunal.

(4) In any case where the Head of the Department is not consulted, he shall be informed of the action that is being taken.

(5) There shall be a Director of Prosecutions and as many Additional Directors of Prosecutions as may be considered necessary to conduct enquiries on behalf of the Government in disciplinary cases before the Tribunal and the accused officer concerned shall be allowed to be represented by counsel. In case where the Director of Prosecutions or any of the Additional Directors of Prosecution cannot attend to examinations of witnesses on commission, and ad-hoc Director of Prosecutions shall be appointed. (As per G.O.Ms. No. 109 (Ser.D) 25-2-1969."

6. Rule 2(b) of DPT Rules defines the "misconduct":-

"Misconduct" shall have the same meaning as criminal misconduct under Section 5(1) of the Prevention of Corruption Act, 1947 (Central Act II of 1947) and shall include any attempt to commit any offence referred to in clause (c) or clause (d) of that section and any "wilful contravention of the rules made under the proviso to Article 309 of the of persons appointed services and posts in connection with the affairs of the

State." (G.O.Ms. No. 1026, G.A. (Ser-D), dated 16-2-1969."

7. Admittedly, the respondent had remained absent from duty for more than five years commencing from 10th June, 1968 till the order of removal was made on September 23, 1977. His absence from duty, therefore, would be covered by the definition of misconduct under Rule 2(b) of DPT Rules.

Learned counsel for the appellants urged that Rule 4(1) and (2) of DPT Rules have no application in the present case because no vigilance investigation was ever directed by the Government of Andhra Pradesh, Vigilance Commission. Alternatively, it was submitted that assuming that clause (2) of Rule 4 of DPT Rules applies in the present case yet the same is not mandatory and, therefore, no consultation by the Government with the Andhra Pradesh Vigilance Commission would not render the order dated 23rd September, 1977 illegal. A somewhat similar question fell for consideration before the Constitution Bench of this Court in State of U.P. Vs. Manbodhan Lal Srivastava, 1958 SCR 533. In this reported decision, a penalty of reduction in rank was made without consulting the Public Service Commission. An argument was raised that under Article 320(3)(c) of the Constitution of India, it was obligatory to consult the Public Service Commission before any adverse order was made against the public servant. This Court while construing the provisions of Articles 311 and 320 (3)(c) of the Constitution held that the provisions of Article 320(3)(c) relating to the prior consultation with the Public Service Commission are not mandatory and that non compliance thereof does not afford cause of action to the respondent (public servant) in a court of law. This Court observed as under:-

"An examination of the terms of Article 320 shows that the word "Shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320(3)(c) are mandatory in terms, the other clauses or sub-clauses of that article will have to be equally held to be mandatory. If they are so held, any appointments made to the public services of the Union or a State, without observing strictly the terms of these sub-clauses in clauses (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter. This result could not have been contemplated by the makers of the Constitution. Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding, or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used,

the statute is only permissive or directly in the sense that non-compliance with those provisions will not render the proceeding invalid."

8. The relevant portion of clause (2) of Rule 4 of DPT Rules reads thus:-

"4(2)-But before taking a decision, the Government shall consult the Andhra Pradesh Vigilance Commission."

9. The phraseology used in Article 320(3)(c) is similar and reads thus:-

"The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted."

10. The word "shall" appearing in clause (2) of Rule 4 set out herein above, therefore, in our opinion, is not mandatory and consequently non consultation with the Andhra Pradesh Vigilance Commission would not render the order of removal of the respondent passed on 23rd September, 1977 illegal.

11. Mr. H.S.Gururaja Rao, the Learned Senior Counsel appearing for the respondent relied upon the Judgment of this Court in Deokinandan Prasad Vs. State of Bihar 1971 (Suppl.) S.C.R. 634 to contend that the word "shall" in clause (2) of Rule 4 of the DPT Rules must be construed as mandatory and non observance thereof would render the order dated 23rd September, 1977 illegal. After going through the judgment, we are unable to accept the contention raised on behalf of the respondent. He then relied upon another decision of this Court in Jai Shanker Vs. State of Rajasthan 1966(1) SCR 825. It was a case where Regulation 13 of Jodhpur Service Regulations was not questioned. it provided for automatic termination of service on account of over staying the leave period for more than one moth. The question raised before the Court was whether such termination attracts Article 311 and answer given by this Court is in the affirmative. The facts of this reported decision are quite distinguishable and has no application to the facts of the present case.

12. For the foregoing reasons, we allow the appeal and set aside the order dated August 7, 1984 passed by the Andhra Pradesh Administrative Tribunal. In the circumstances, there will be no order as to costs.