

PETITIONER:
STATE OF M.P.& ORS.

Vs.

RESPONDENT:
R.N.MISHRA & ANR.

DATE OF JUDGMENT: 17/09/1997

BENCH:
K. VENKATASWAMI, V.N. KHARE

ACT:

HEADNOTE:

JUDGMENT:
THE 17TH DAY OF SEPTEMBER, 1997

Present:

Hon'ble Mr. Justice K. Venkataswami

Hon'ble Mr. Justice V.N. Khare

Sakesh Kumar, Charu Singha and S.K. Agnihotri, Adv. for the appellants.

Shiv Sagar Tiwari, Adv. for the Respondents

J U D G M E N T

The following Judgement of the Court was delivered;

J U D G M E N T

V.N.KAHRE, J.

In the year 1974-75, the respondent herein was posted as Forest Range officer in Majhgawan Range. Forest Circle Satna.(M.P)when he was alleged to have committed certain acts of misconduct. Consequently, in the year 1976 a preliminary inquiry was initiated to inquire into the allegations against the respondent was promoted as Assistant Conservator of Forest, while the preliminary inquiry was in progress. A charge-sheet was issued on 12-7-1982 and served upon the respondent, who was required to submit his explanation thereto. The charges contained in the Charge sheet related to the year 1974-75 when the respondent was posted as Forest Range Officer in Majhgawan Range, District State Government by an order dated 26th September, 1986, inflicted penalty on the respondent by withholding his two increments. The respondent appealed against the said order. During the pendency of the said appeal, the respondent filed Original Application before the Madhya Pradesh Administrative Tribunal (for short "the tribunal") for setting aside the order dated 26th September, 1986 whereby his two increments were withheld.

The Tribunal, being of the opinion that by promoting the respondent to the Post of Assistant Conservator of Forest in the Year 1977, the allegations of misconduct attributed to the respondent stood condoned and as such, the penalty imposed upon him by the impugned order dated 26th September, 1986 passed by the State Government and allowed the Application of the respondent. Aggrieved by the judgement and order dated 23.4.1993 passed by the Tribunal in O.A. No.492/89, the State Government has come up in

appeal before this Court.

Learned Counsel for the appellants urged that the principle of condonation of misconduct under the ordinary law Master and Servant is not applicable where in law the appointing authority is required to consider the case of an employee for promotion despite the pendency of preliminary inquiry against him and the employee is promoted to higher post having found fit for promotion. In short, the argument is, that by promoting the respondent to the post of Assistant Conservator of Forest, the allegation of misconduct against him, which is the subject matter of inquiry, in law, cannot be treated as misconduct.

Before we advert to the argument of the learned counsel for the appellant, it may be seen as to what is the doctrine of condonation of misconduct under the ordinary law of master Servant, an employer has option to punish an erring employer if voluntary elects not to take any action to punish the delinquent officer, then it would be a case of Condonation of Misconduct by the master. In labor and Labor Relations [48 Am Jr 2nd 639] - it is stated thus:

"636.- Condonation of Misconduct.

The doctrine of condonation prohibits an employer from misleadingly agreeing to return his employees to work and then taking disciplinary forgiven. (Packers Hide Asso.V. NLRB (CAB)360 F2d 59). Condonations can be found, however, only where there is clear and convincing evidence that the employer has completely forgiven the guilty employee for his misconduct and has agreed to a resumption of the employee relationship as though no misconduct had occurred. [Packers Hide Asso. V. NLRB (supra)]."

In L.W Middleton v.Harry Plyfair [AIR 1925 Cal.87 at p.88] it was held thus:

"If a master on discovering that his servant has been guilty of misconduct which would justify which would justify a dismissal, Yet elects to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned."

In District Council, Amraoti through Secretary V. Vithal Vinayak Bapat [AIR 1941 Nagpur 125], it was held that:

"Once a master has condoned any misconduct on a part of servant which would have justified dismissal or a fine, he cannot, after such condonation, go back upon his election to condone and claim a right it dismiss him or impose a fine or any other punishment in respect of the offence which has been condoned."

The substance of the decision cited above is that under ordinary law of Master and Servant once an employer has

condoned any misconduct attributed to an employee, which have otherwise justified his dismissal or punishment, the employer cannot after such condonation go back upon his election to condone and assert a right to punish the servant. But, the question that arises for consideration in the instant case is, whether the doctrine of condonation of misconduct under ordinary law of master and servant can be pressed into service where an employee is governed by statutory rules, and under law the employer is required to consider the case of an employee for promotion against whom a preliminary enquiry is pending. To begin with when there is an offer and acceptance of an appointment, the relationship between the employee and Government may be contractual, but once an employee is appointed, he acquires a status, as his conditions of service are regulated by statutory rules or provisions of an Act. Under law, government is not justified in excluding an employee from the field of consideration for promotion merely on the ground that certain disciplinary proceedings are contemplated or some preliminary inquiry to inquire into the misconduct attributed to that employee are pending. In *New Bank of India V. N.P. Sehgal & Anr.* [J.T. 499], it was held by this court, thus:

"..... the mere fact that disciplinary proceedings are contemplated or under consideration against an employee does not constitute a good ground for not considering the employee concerned for promotion if he is in the zone of consideration nor would it constitute a good ground for denying the promotion if the employee is considered otherwise fit for promotion."

In *B.C. Chaturvedi V. Union of India and others*, [(1995) 6 SCC 749 at page 757] this court held as follows:

"It is true that pending disciplinary proceeding, the appellant was promoted as Assistant Commissioner of Income tax. Two courses in this behalf are open to the competent authority, viz., sealed cover procedure which is usually followed, or promotion, subject to the result of pending disciplinary action. Obviously, the appropriate authority adopted the latter course and gave the benefit of promotion to the appellant. Such an action would not stand as an impediment to take pending disciplinary action to its logical conclusion. The advantage or promotion gained by the delinquent officer would be no impediment to take appropriate decision and to pass an order consistent with the finding of provide misconduct."

In view of these decisions, it must be held that an employee/officer who is required to be considered for promotion, despite the pendency of preliminary inquiry or contemplated inquiry against him is promoted, having found fit, the promotion so made would not amount to condonation

of misconduct which is subject matter of the inquiry.

In the present case, misconduct attributed to the respondent came to light in the year 1976 when a preliminary enquiry was ordered and while the inquiry was continuing, the State Government was required to consider the case of the respondent for promotion to the post of Assistant Conservator of Forest. Under law, the State Government could not have excluded the respondent from the zone of consideration, merely on the ground that a preliminary inquiry to enquiry into the allegations of misconduct attributed to him was pending. In such a situation, the doctrine of condonation of misconduct cannot be applied as to wash off the acts of misconduct which was the subject matter of preliminary enquiry. We are, therefore, of opinion that the promotion of the respondent to the post of Assistant Conservator of Forest would not amount to condonation of misconduct alleged against him which was the subject matter of preliminary inquiry. Consequently, the punishment imposed on the respondent by the State Government was valid and legal. The decision relied upon by the Tribunal as well as by learned counsel for the respondent in the case of Lal Audhraj Singh V. State of M.P. [AIR 1967 M.P. 284] is not applicable to the facts of the present case, as in that case, the employer had a choice to inflict punishment on the employee but the employer did not choose to punish the employee and in that context, it was held by the High Court that the misconduct attributable to the employee was condoned.

For the foregoing reasons, the judgement and order dated 23.4.1993 passed by the Madhya Pradesh Administrative Tribunal in O.A.NO.. 492/89, is set aside and the present appeal allowed. There shall be no order as to costs.