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THE STATE OF PUNJAB AND ORS.

v.

BAKSHISH SINGH

SEPTEMBER 8, 1998

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[S. SAGHIR AHMAD AND S. RAJENDRA BABU, JJ.]

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Civil Procedure Code, 1908—Order XLI Rule 33—Appellate court—Exercise of power under—To pass decree or order in favour of the party who has not filed appeal or cross objection—Held, can be exercised in order to do complete justice between the parties.

Constitution of India, 1950—Article 142—Jurisdiction under—Scope of—Held, the court cannot ignore the substantive rights of a litigant while dealing with a cause before it.

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Judicial Process—Remand of case—Propriety of—Held, in the facts of the present case, not proper.

Service Law—Dismissal from Service treating absence of leave as misconduct—Validity of.

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Respondent, a police constable, was dismissed from service on the charge of unauthorised absence from duty, holding him to be guilty of misconduct. The suit filed against the dismissal order was decreed on the grounds that the period of absence having been regularised as period of leave without pay the charge of unauthorised absence did not survive. The trial court also found that the respondent was not given an opportunity of personal hearing during departmental proceeding and the allegation that his signature on certain papers were taken under duress, was not controverted by the appellant.

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In appeal the lower appellate court confirmed the finding of the trial court that the charge of misconduct did not survive, but it further decided that absence from duty would not amount to grave misconduct and remanded back the case to the punishing authority for fresh order of punishment. It also did not set aside other findings of the trial court. The appellant filed an appeal before the High Court which was dismissed

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summarily. The respondent did not file any cross appeal against the order

of remand.

In appeal to this court the appellant - State contended that the order of remand having been upheld by High Court and the respondent not having filed a cross appeal against the order, the intervention of this court, even in exercise of its power under Article 142 of the Constitution, would be without jurisdiction.

Allowing the appeal, this Court

HELD : 1. Once it was found as a fact that the charge of unauthorised absence from duty did not survive, the lower appellate court could not have remanded the matter back to the punishing authority for passing a fresh order of punishment. In the face of the findings, specially the findings of the trial court that proper opportunity of hearing was not given and the signatures of the respondents were obtained under duress during departmental proceedings, which have not been set aside by the lower appellate court, there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment. [481-F; G]

2.1. The contention of the appellant - State that this Court cannot intervene in this matter even while exercising its power under Article 142 of the Constitution, since the respondent had not filed a cross appeal against the remand order, cannot be accepted. While exercising power under Article 142 of the Constitution, the court cannot ignore the substantive rights of a litigant while dealing with a cause pending before it. The power cannot be used to "supplant" substantive law applicable to a case. Article 142 even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly. [482-A; C]

Supreme Court Bar Association v. Union of India & Anr., AIR (1998) SC 1895, relied on.

2.2. Order XLI Rule 33 Civil Procedure Code gives very wide powers to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or

A cross-objections. The discretion, however, has to be exercised with care and caution and that too in rare cases where there has been inconsistent finding and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case. [483-A; B; C]

2.3. The appellate court shall have the same powers as are conferred on the original court. If the trial court could dispose of a case finally, the appellate court could also, by virtue of clause (a) of sub-section (1) of section 107 of Civil Procedure Code, determine a case finally. [483-D]

R.S. Lala Praduman Kumar v. Virendra Goyal & Ors., AIR (1969) SC 1349, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4212 of 1997.

From the Judgment and Order dated 21.8.96 of the Punjab & Haryana High Court in R.S. A. No. 1555 of 1996.

R.S. Sodhi for the Appellants.

Shakeel Ahmed for the Respondent.

The Judgment of the Court was delivered by

S. SAGHIR AHMAD, J. The respondent who was a police constable in Punjab was dismissed from service on 1.6.1998 after a regular departmental enquiry on the charge of unauthorised absence from duty. This order was challenged by the respondent in a suit filed in the trial court on 16.7.1990 which was decreed on 12.5.1993 and the order of dismissal was set aside as it was found by the trial court that the defendants having themselves regularised and treated the period of respondent's absence from duty as the "period of leave without pay", could not legally say that he was guilty of misconduct for unauthorised absence from duty. The trial court also recorded a finding that the respondent's statement that he was not given an opportunity of personal hearing and that his signatures were obtained under duress in the departmental proceedings was not controverted by the appellant as no evidence was produced by the appellant

in defence.

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The decision of the trial court was challenged in appeal before the District Judge which was disposed of by the Addl. District Judge, Jalandhar on 15.1.1996 with the following findings :

"In view of the above brief discussion, I am of the considered opinion that once period of absence is treated as leave of the kind whatsoever, the fact that the delinquent remained absent from duty cannot be sustained after the person has been treated on whatsoever kind it may be. Thus the findings of the learned lower court upon this matter are hereby confirmed."

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Having affirmed the findings of the trial court that the charge of absence from duty did not survive, the lower appellate court proceeded to consider the question whether absence from duty was a misconduct of the gravest kind so as to warrant the maximum penalty of "dismissal from service" or it was a mere "misconduct" for which lesser punishment would be appropriate. Having found that it was not a case of misconduct of the gravest kind, the lower appellate court remanded the case back to the punishing authority for passing a fresh order of punishment. The appellant then filed a second appeal in the High Court which was dismissed summarily.

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It will thus be seen that the trial court as also the lower appellate court has both recorded the findings that the period of absence from duty having been regularised and converted into leave without pay, the charge of absence from duty did not survive. Once it was found as a fact that the charge of unauthorised absence from duty did not survive, we fail to understand how the lower appellate court could remand the matter back to the punishing authority for passing a fresh order of punishment. In the face of these findings, specially the finding of the trial court that proper opportunity of hearing was not given and the signatures of the respondents were obtained under duress during departmental proceedings which have not been set aside by the lower appellate court, we are of the view that there was no occasion to remand the case to the punishing authority merely for passing a fresh order of punishment.

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Learned counsel for the appellant contended that respondent has not filed any cross appeal and, therefore, the order of remand passed by the

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- A lower appellate court for a fresh order of punishment need not be interfered with, particularly as that order has been upheld by the High Court which had summarily dismissed the second appeal filed by the State of Punjab. If, therefore, this Court intervenes in the matter even in exercise of its power under Article 142 of the Constitution, the same would be without jurisdiction. This contention cannot be accepted.

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A Constitution Bench of this Court in *Supreme Court Bar Association v. Union of India & Anr.*, AIR (1998) SC 1895 has already held that while exercising power under Article 142 of the Constitution, the court cannot ignore the substantive rights of a litigant while dealing with a cause pending before it. The power cannot be used to "supplant" substantive law applicable to a case. The court further observed that Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby achieve something indirectly which cannot be achieved directly.

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In this case, what we propose to do would be fully in consonance with the provisions of order XLI Rule 33 which provides as under :

"ORDER XLI - APPEAL FROM ORIGINAL DECREES:

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33. *Power of Court of Appeal* - The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.

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Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

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This provision gives very wide power to the appellate court to do complete justice between the parties and enables it to pass such decree or order as ought to have been passed or as the nature of the case may require notwithstanding that the party in whose favour the power is sought to be exercised has not filed any appeal or cross-objections.

The discretion, however, has to be exercised with care and caution and that too in rare cases where there has been inconsistent findings and an order or decree has been passed which is wholly uncalled for in the circumstances of the case. The appellate court cannot, in the garb of exercising power under Order XLI Rule 33, enlarge the scope of the appeal. Whether this power would be exercised or not would depend upon the nature and facts of each case.

The powers of the appellate court are also indicated in Section 107 of the Code of Civil Procedure which provides that the appellate court shall have the same powers as are conferred on the original court. If the trial court could dispose of a case finally, the appellate court could also, by virtue of clause (a) of sub-section (1) of Section 107, determine a case finally. In *R.S. Lala Praduman Kumar v. Virendra Goyal & Ors.*, AIR (1969) SC 1349, it was held that the appellate court could even relieve against forfeiture in a case under the Transfer of Property Act. This too was based on the principle that the power which was available to the original court, could be exercised by the appellate court also.

Applying the above principles to the instant case, it will be noticed that the trial court recorded a categorical finding of fact that a proper opportunity of hearing was not afforded to the respondent in the departmental proceedings and that his allegation that his signatures on certain papers during those proceedings were obtained under duress, was not controverted as the State of Punjab had lead no evidence in defence. The trial court also recorded a finding that unauthorised absence from duty having been regularised by treating the period of absence as leave without pay, the charge of misconduct did not survive. It was with this finding that the suit was decreed. The lower appellate court confirmed the finding that since the period of unauthorised absence from duty was regularised, the charge did not survive but it did not say a word about the finding relating to the opportunity of hearing in the departmental proceedings. Since those findings were not specifically set aside and the lower appellate court was

- A silent about them, the same shall be treated to have been affirmed. In the face of these findings, it was not open to the lower appellate court to remand the case to the punishing authority for passing a fresh order of punishment. The High Court, before which the second appeal was filed by the State of Punjab, did not advert itself to this inconsistency as it dismissed the appeal summarily, which indirectly reflects that it allowed an inconsistent judgment to pass through its scrutiny.

It is in these circumstances that we, in exercise of our power of doing complete justice between the parties, finally decide this appeal and the whole case by providing as under :

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- (a) The appeal is allowed.
 - (b) The judgment dated 15.1.1996 passed by the lower appellate court in so far as it purports to remand the case to the punishing authority as also the judgment of the High Court dated 21.8.1996 are set aside.
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- (c) The judgment and decree passed by the trial court is upheld.

There will be no order as to costs.

K.K.T.

Appeal allowed.