
(1999) 09 AHC CK 0026
In the Allahabad High Court
Case No : C.M.W.P. No. 31202 of 1992

Ashok Kumar Pandey

APPELLANT

Vs

State of Uttar Pradesh and others

RESPONDENT

Date of Decision : 08-09-1999

Acts Referred:

Constitution of India, 1950 — Article 127
Contract Act, 1872 — Section 23
Uttar Pradesh State Handloom Corporation Ltd. (Officers and Staff) Service Rules,
1981 — Rule 63A, 67, 68, 9

Citation : (1999) 4 AWC 3245 : (1999) AWC 3245 : (1999) 3 UPLBEC 1984

Hon'ble Judges : V.M. Sahai, J

Bench : Single Bench

Advocate : L.K. Dwivedi, for the Appellant; Amresh Singh, S.C. and V.K. Birla,
for the Respondent

Judgement

V. M. Sahai, J.—The petitioner a diploma holder in textile after completing one month's production training in U. P. Handloom Corporation Ltd. was appointed on probation as production inspector for one year on 22.8.83. He joined on 25.8.83 at Salon, district Raf-Bareilly. He was transferred by the managing director from Rai-Bareilly to Rishikesh. He was relieved by the project officer on 5.1.89. According to respondents, the petitioner got his transfer stayed. On 24/25.1.89 the petitioner was directed to report at Naogaon, Uttar Kashi. The petitioner sent applications for leave on 6.1.89, 11.3.89, 11.5.89, 12.7.89 and 14.8.89. He claims that he was patient of esonophilia which was cured to large extent in 1982 but the hills were not suitable for his health. The respondents dispute the receipt of applications for leave. It is also claimed that the petitioner was directed to get himself examined by the Chief Medical Officer but he did not comply. The respondents informed the petitioner on 10.7.89 to join the duty. But the petitioner instead of joining sent the application for leave. Since the petitioner did not join, the respondent published a notice in newspaper, "Swatantra Bharat" dated 18.8.89 asking the petitioner to join his duty as his leave cannot be

sanctioned. It was stated that if the petitioner did not join his duty within three days. It would be treated that he was not interested in working in the corporation and he would be dismissed from service without any notice. According to petitioner, he had grown very weak, therefore, he could not join and when he went to join in November 1989 he was informed that since he did not join, the General Manager of the Corporation passed an order dated 7.11.89 that the petitioner had abandoned his service w.e.f. 6.1.1989. The order dated 7.11.1989 was challenged by the petitioner by means of Civil Misc. Writ Petition No. 1677 of 1992 which was dismissed on 3.1.1992. The order was challenged by way of Special Appeal. It was disposed off by this Court on 23.3.1992 with a direction to the petitioner to make representation and the respondent to decide within a fortnight after giving an opportunity of hearing to the petitioner. The Managing Director by its order dated 22.5.1992 rejected the representation of the petitioner. The order does not disclose any reason.

2. On the arguments advanced by Sri L. K. Dwivedi. the learned counsel for the petitioner and Sri V. K. Birla the learned counsel for the respondent, the questions that arise for consideration are whether the absence of the petitioner, on the facts of the case, could be treated as abandonment, whether the respondent could dispense with the services of the petitioner without any opportunity of hearing, whether the general manager who was a delegate of managing director could pass the impugned order, whether Rule 63A was arbitrary and invalid being contrary to public policy.

3. The service conditions of employees of corporation are governed by Uttar Pradesh State Hand loom Corporation Limited (Officers and Staff) Service Rules, 1981 (in brief Rules) framed by the board of directors of the corporation in exercise of power conferred on it by clause (ix) of Article 127 of the Article of Association. Chapter VIII of the Rules deals with superannuation, retirement and quintal of service. Rule 63A added to this chapter deals with automatic termination of lien. It is extracted below :

"If any employee remains absent from his duty without any information or prior approval for his absence or over-stays after expiry of the leave period originally sanctioned or subsequently extended, thereby in time, he will lose lien on his appointment if he does not report for work within 15 days from the date of the beginning of such unauthorised absence. However, lien may be restored at any time subject to discretion of the management after submission of satisfactory explanation to the management by the employee concerned."

4. Chapter X deals with miscellaneous provisions. Rule 67 deals with conduct and control of employees. Its sub-rule (23) defines misconduct as under :

23. Misconduct.--(i) Without prejudice to the generality of the word "misconduct". the following acts of omission or commission shall be treated as misconduct on the part of an employee : (e) absence without leave or overstaying the sanctioned leave for more than four consecutive days without

sufficient grounds or satisfactory explanation.

5. Rule 68 deals with disciplinary proceedings. Its sub-rules provide in detail the procedure to be followed for suspension and imposition of minor and major penalties. The rules thus provide two different procedures for absence of an employee. One is misconduct under Rule 67 for which an action can be taken in accordance with procedure provided under Chapter X. Another where the employee loses his lien if he does not report for duty within 15 days from the date of beginning of unauthorised absence, in the former, the corporation has to prove that the absence of the employee for more than four consecutive days was without sufficient cause and in the latter it is automatic. What is end result after inquiry, an opportunity of hearing in one is the beginning and end in the other. The power under Rule 63A is undoubtedly very harsh, as compared to Rule 67, as it deprives the employee of any opportunity or right of hearing before the action is taken, therefore, the exercise of power has to be examined on the test of arbitrariness and public policy which without any thing else makes any action illegal and invalid. I may point out that the learned counsel for petitioner, rightly, did not seriously argue that the orders were bad as there being two procedures provided for being absent, the respondent in opting for the harsher procedure acted arbitrarily.

6. The word abandonment has not been defined in the rules. The general manager in his order has drawn an inference from the facts. Abandonment is a concept in law. What would amount to abandonment or when abandonment can be said to be established is not easy to state. The meaning of the word "abandonment" was considered by the Apex Court in *G. T. Lad and Others Vs. Chemical and Fibres of India Ltd.*, . The Court while considering the provisions of the Industrial Disputes Act. held as under :

"In the Act, we do not find any definition of the expression "abandonment of service". In the absence of any clue as to the meaning of the said expression, we have to depend on meaning assigned to it in the dictionary of English language. In the unabridged edition of the Random House Dictionary, the word "abandon" has been explained as meaning to leave completely and finally ; forsake utterly, to relinquish, renounce, to give up all concern In something". According to the Dictionary of "English Law by Earl Jowitt (1959 edition) "abandonment" means "relinquishment of an interest or clam". According to the Black's Law Dictionary "abandonment" when used in relation to an office means Voluntary relinquishment". It must be total and under such circumstances as clearly to indicate an absolute relinquishment. The failure to perform the duties pertaining to the office must be with actual or imputed intention, on the part of the officer to abandon and relinquish the office. The Intention may be inferred from the acts and conduct of the party, and is a question of fact. Temporary absence is not ordinarily sufficient to constitute as "abandonment of office. "

7. Abandonment of service, thus, means voluntary relinquishment of office by employee. To constitute abandonment, there must be clear intention of the

employee to give up his duties. It must be total so as to give rise to one and only one inference that the employee has abandoned. The inference that an employee has abandoned or relinquished his service cannot be presumed unless it is clear from the facts, that the employee intended to abandon service. Abandonment or relinquishment of service is always a question of intention and normally, such an intention cannot be attributed to an employee without adequate evidence in this behalf. Absence from duty can be temporary or for reasons, beyond control of the employee. For instance, if an employee remains absent from his duty after giving an application for leave, supported by medical certificate, which may not be sanctioned but that alone may not be sufficient to give rise to an Inference that the employee had abandoned the service. The law requires something more to make such absence as voluntary relinquishment. What are such circumstances cannot down as pointed out by the Apex Court in G. T. Lad case (supra) but shall depend on facts and circumstances of each case. The petitioner fell ill on 6.1.89. He sent an application for leave accompanied by a medical certificate. He went on making applications till August 1989. Whether the medical certificate was from a doctor on which reliance could be placed or whether petitioner was ill or he was making application after application because he did not want to go to hills may be believed or not but they cannot give rise to an inference in law that the petitioner abandoned his service from 6.1.89.

8. The next question is whether the absence of petitioner after the letter sent by respondents in July, 1989 asking him to join as it was not possible to sanction leave and in any case the publication of notice in the "Swantantra Bharat" that if the petitioner did not join within three days, he would be dismissed from service, amounted to abandonment and the order passed by the respondents on 7.11.89 was in accordance with rules. The respondent have inferred abandonment by applying Rule 63A extracted above. Similar provisions framed by different corporations and Government companies came up for consideration before the Apex Court. The first such occasion arose in The Buckingham and Carnatic Co.Ltd. Vs. Venkatiah and Another, . The Court was concerned with standing order No. 8 (ii) which was more or less similar to Rule 63A of the Rules framed by the Handloom Corporation. The Court held, where the parties agree upon the laws and conditions of service and they are included in certified standing orders, the doctrine of common law or considerations of equity would not be relevant. I may point out that in this decision, it was neither argued nor the Court was required to decide whether such a rule providing for automatic termination of service in absence of any provision for affording opportunity of hearing was arbitrary and opposed to public policy. The decision, therefore, is an authority only on the proposition laid down by it that principles of equity do not apply to such agreements.

9. In Jai Shanker Vs. State of Rajasthan, . the Constitution Bench was concerned with Regulation 13 of Jodhpur Service Regulations which provided that if an employee remained absent without permission for one month or longer, then he would be considered to have sacrificed his service. In other words, the rules

provided for automatic termination of service for absence. The bench did not uphold automatic discharge from service as valid as the employee was entitled to show cause against removal for his overstay. The . Court held that the rules could not operate unless the Government told the employee that he was being discharged due to overstay and it was proposed to remove, therefore, he may show cause as to why his services may not be dispensed with. The decision was no doubt on service rules framed by the Government but the Constitution Bench did not approve automatic removal from service as it was contrary to Article 311 of the Constitution.

10. The law on the inequality of bargaining power of the parties resulting in such clauses in services contracts was for the first time held to be opposed to public policy u/s 23 of the Contract Act in *Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another*, . The Court was concerned with validity of Rule 9 (i) of the Rules framed by the corporation under which it could terminate services of its employee by giving three month's notice. The Court held that even though the employee accepted the appointment on the terms Indicated in the standing orders, such contracts being opposed to public policy, as provided by Section 23 of the Contract Act, were invalid. It was further held that a service rule framed by corporation which denied any opportunity of hearing was illegal. This decision was approved by a Constitution Bench in *Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others*, . The majority held that a provision in the rule for termination of service without any notice was arbitrary and uncanalised.

11. In *D.K. Yadav Vs. J.M.A. Industries Ltd.*, , the Court was concerned with Clause 13 (2) (iv) of standing order which provided for automatic termination of service if the employee remained absent continuously for more than eight days resulting in loss of his lien. The provision was more or less akin to Rule 63A of the Handloom Corporation. The Court held that unless the principle of natural Justice was read in the standing order, it was arbitrary and unfair. Simitar provision for automatic termination of service in *Uptron India Ltd. a. Shammi Bhan* 1998 6 SCC 539, was held to be invalid. The Court held that any clause in the Certified Standing Orders providing for automatic termination of service of a permanent employee was bad if it did not provide for opportunity of hearing.

12. The law thus is settled that any provision in a standing order or service contract which has statutory force providing for automatic termination of service would be unfair, unjust, therefore, Illegal, arbitrary and opposed to public policy. Such a rule has to be struck down unless the principle of natural Justice is read into it. The argument of the learned counsel for the respondent that the petitioner could have represented as provided in the rules and if the authority would have been satisfied, his lien could have been restored, therefore, the interest of the petitioner is amply safeguarded and ft adequately meets the requirement of natural justice cannot " be accepted. In *Jat Shanker's* case (supra), the Apex Court rejected same argument. Even though the Court was

considering service rules framed by the Government but it does not make any difference as the provision being similar the opinion of the Court is fully applicable to this case as well. The Court while replying to the argument of the Advocate General observed as under :

".....We cannot accept this as sufficient answer. The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered to be discharged or removed from service. The question of reinstatement can only be considered if it is first considered whether the person should be removed or discharged from service. Whichever way one looks at the matter the order of the Government involves termination of service when the incumbent is willing to serve. The regulation involves a punishment for overstaying one's leave and the burden is thrown on the incumbent to secure reinstatement by showing cause....."

13. Rule 63A thus is invalid being opposed to public policy. It is arbitrary as it deprives an employee of service without affording any opportunity of hearing. Security of tenure is one of the necessary incidents for efficient and proper functioning of an employee whether it is Government service or service of a corporation. Since the rule providing for automatic termination of service due to absence of an employee is opposed to public policy, the action taken against the petitioner under Rule 63A without affording an opportunity of hearing cannot be upheld. In this view, it is not necessary to decide any other point. Therefore, for the aforesaid reasons, the order dated 7.11.89 and 22.5.92 passed by respondents cannot be upheld.

14. In the result, the writ petition succeeds and is allowed. The order dated 7.11.89 passed by respondent No. 3 Annexure-7 and order dated 22.5.92 passed by the respondent No, 2 Annexure-14 to the writ petition are quashed. The respondents are directed to reinstate the petitioner in service and pay his entire arrears of salary within two months from the date a certified copy of this order is produced before respondent No. 2.

15. Petitioner shall be entitled to his costs.