
(1955) 09 PAT CK 0015
In the Patna High Court
Case No : Misc. Judicial Case No. 166 of 1954

Bhagwandas

APPELLANT

Vs

Senior Superintendent, Way and Works, Eastern Rly.

RESPONDENT

Date of Decision : 01-09-1955

Acts Referred:

Constitution of India, 1950 — Article 226, 311
Government of India Act, 1935 — Section 240(2)

Citation : AIR 1956 Patna 23

Hon'ble Judges : Das, C.J.;Kanhaiya Singh, J

Bench : Division Bench

Advocate : B.C. Ghosh and Birendra Prasad Sinha, for the Appellant; P.K. Bose, for the Respondent

Final Decision : Dismissed

Judgement

Das, C.J.—This is an application for the issue of a writ, praying that the order of removal passed against the petitioner, with effect from the afternoon of 31-7-1948, be quashed and that the petitioner be reinstated to the post which he held before his removal from service.

2. The relevant facts as alleged by the petitioner are the following. The petitioner, Sri Bhagwan Das, worked as a clerk under the then East Indian Railway Company from 13-8-1923, to 31-12-1924. The East Indian Railway Company was taken over by the Government of India sometime in 1925, and by an agreement dated 29-10-1925, the petitioner accepted the offer of the Railway Board to serve the Government of India as a clerk from 1-1-1925.

In pursuance of the said agreement, the petitioner continued in State Railway Service and worked as Head Bill Clerk in the Engineering Accounts Department in the office of the Divisional Superintendent, Dinapur. It was alleged by the Railway Department concerned that the petitioner was absent from duty without sufficient cause on 19-11-1947, and again on the 25-12-1947. Two charges were framed against the petitioner and he was asked to explain. It is stated that the

petitioner submitted an explanation with regard to his absence on 19-11-1947.

On behalf of the Railway Department it is alleged that the petitioner submitted no explanation with regard to his absence on 25-12-1947; on the contrary, the petitioner continued to remain absent from duty. Then, on 12-6-1948, the petitioner was served with the following removal notice:

"East Indian Railway

Dated 9/12-6-1948

Removal Notice

No. EC/48. To

Babu Bhagwan Dass, Clerk,

Optg: Accounts, Dinapore,

C/ Hd Clerk, Optg. Accounts,

1 Dinapore.

He will please make over charge of all Railway property and report to this office.

As your services are no longer required by the Administration you are hereby removed from service by my orders in terms of your agreement and conditions of service, and you are hereby given one month's notice with effect from 1-7-48 as provided for therein. Your services will accordingly terminate on the afternoon of 31-7-48.

You are to hand over to Head Clerk, Optg. Accounts Dinapore, all Railway property, if any, which is in your possession and let me know when and how you wish to be settled up and receive payment of your dues.

You are, on expiry of your notice, to vacate railway quarters, if any, at once; otherwise you are liable to pay rent at the rates applicable to outsiders.

You are to acknowledge this.

Station Dinapore Sd. B. S. D. B. Dated 9/12-6-1949 Designation, Senior Superintendent, Way and Works, Dinapore."

3. The petitioner admittedly received the notice, and on 30-7-1948, he sent a reply to the Divisional Superintendent Dinapur, in which the petitioner stated as follows:

"With reference to your above (referring to the notice dated 12-6-1948), I beg to inform you that I am not in a position to go to office as asked for in your above notice. Moreover, I have already made over all papers etc. which were in my custody as Head Bill Clerk to my successor Babu S. P. Choudhury on 25-12-47.

Under the circumstances will you please arrange to pay all my dues, i.e.

Provident Fund etc. as soon as possible."

Except writing the aforesaid letter, the petitioner does not appear to have done anything else till 19-6-1950, when he addressed another letter to the Divisional Superintendent Dinapur, which letter is marked Annexure E to the substantive application of the petitioner. In this letter the petitioner alleged that he was discharged by the Divisional Superintendent Dinapur, who had no-authority to discharge him, inasmuch as the petitioner was appointed by the General Manager, who was the only competent authority to discharge or remove the petitioner from service.

In paragraph 4 of the letter the petitioner stated that he would hold the Divisional Superintendent, Dinapur responsible for the mental and physical pain caused to the petitioner by the order of removal and asked for compensation either by way of reinstatement to his original post with full payment of arrears of salary or payment of the full amount of gross salary till the date of retirement. The petitioner also asked for certain payments which are referred to in paragraph 5 of the petition marked Annexure E to the application of the petitioner. The petitioner states that no reply was received by him to the aforesaid letter.

In paragraph 6 of the petition, the petitioner stated that he understood that his letter was sent by the Divisional Superintendent, Dinapur, to the Deputy General Manager, Calcutta, to which the Deputy General Manager replied that no action need be taken on the petitioner's claim, As the petitioner received no reply to his letter dated 19-6-1950, he made the present application for the issue of a writ on 2-4-1954, that is, a little less than six years after the notice terminating his services with effect from the afternoon of 31-7-1948.

The contentions of the petitioner are, (a) that he has been removed from service by an authority which had no power to remove him, (b) that he was entitled to the protection of Sub-section (2) of Section 240, Government of India Act, 1935, and (c) that as the petitioner was removed from service by way of penalty for absence without sufficient cause, the procedure laid down in the regulations regarding disciplinary action against non-gazetted staff should have been followed; and as the procedure laid down in the said regulations was not followed, the removal of the petitioner from service was illegal and without jurisdiction and should be quashed.

4. On behalf of the Railway authorities, it has been submitted that under the service agreement which the petitioner accepted, the petitioner was employed as a monthly servant and subject to the condition that his service was terminable at any time after one month's notice on either side, or the payment by Government of a sum equal to one month's pay in lieu of notice, or on attaining the age of 55 years. The case of the Railway authorities is that the notice of removal which was served on the petitioner was given in pursuance of the terms of the service agreement and not by way of penalty for unauthorised absence; therefore, the petitioner was neither entitled to the protection of Sub-section (2) of Section 240

of the Government of India Act, 1935, nor of the regulations regarding disciplinary action against non-gazetted staff.

According to the Railway authorities, the matter rests wholly on contract and the services of the petitioner were terminated in terms of the contract between the petitioner and the Railway authorities. It is further submitted by the Railway authorities that the petitioner by his letter dated 30-7-1948, had accepted the order of removal and he wrote his letter dated 19-6-1950, long after the expiry of the period of appeal, in case the petitioner wished to prefer an appeal against his order of removal.

The Railway authorities contend that in these circumstances the order of removal had become final before the Constitution of India came into force on 26-1-1950, and it was not upon to the petitioner to ask for the issue of a writ under Article 226 of the Constitution of India in respect of an order which had become final before Article 226 came into force. Alternatively, the Railway "authorities have contended that the discretionary jurisdiction of this Court under Article 226 of the Constitution of India should not be exercised in the present case, when the order of removal was passed in 1948 and the petitioner filed his application some six years later.

On behalf of the Railway authorities, it was also alleged that the petitioner had served a notice u/s 80. Civil P. C., threatening to bring a suit against the Railway authorities, but no such suit was actually filed, and after waiting for six years the petitioner made his application for the issue of a writ. I may state here that in a reply to the counter affidavit of the Railway authorities the petitioner has denied that any notice u/s 80 Civil P. C., was sent on behalf of the petitioner to the Railway authorities.

5. Four main questions arise for consideration in this case and I propose to take them up in the order stated below:

(1) Whether the petitioner is entitled to the protection of Sub-section (2) of Section 240, Government of India Act, 1935;

(2) Whether the petitioner is entitled to the benefit of the regulation regarding disciplinary action against non-gazetted staff, which regulations are contained in Section II of Chapter XVII of the Indian Railway Establishment Code, Volume I;

(3) Whether the services of the petitioner have been terminated in pursuance of his service agreement and such termination rests wholly in contract, or whether the termination of the services of the petitioner is really by way of the imposition of a penalty for unauthorised absence and the notice terminating the services of the petitioner is merely cloak for disguising the real intention; and

(4) Whether this is a fit case in which writ should issue under Article 226 of the Constitution.

6. Admittedly, the order of removal or termination of the services of the

petitioner was passed at a time when the Constitution of India had not come into force, it is also not disputed that the Constitution of India, so far as the provisions relevant for this case are concerned, is prospective and not retrospective. Therefore, no question arises of the application of Article 311 of the Constitution of India in the present case. As to the protection of Sub-section (2), Section 240 of the Government of India Act, 1935, that sub-section is in these terms:

"No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed."

7. The expression "removal from service" does not occur in Sub-section (2) of Section 240, Government of India Act. It is now well settled that the expressions "dismissal", "reduction in rank" and "removals" have been used in the relevant provisions of the Government of India Act, 1935, and the Constitution of India in a somewhat technical sense, in the sense in which these expressions were used in certain rules relating to discipline, control, etc. of the civil services.

The question has been dealt with by the Supreme Court of India in -- Satish Chandra Anand Vs. The Union of India (UOI), and other subsequent decisions. It is, I think, sufficient if I quote certain observations made by his Lordship, Bose, J. in -- Satish Chandra Anand Vs. The Union of India (UOI), . His Lordship said;

"The services in India have long been afforded certain statutory guarantees and safeguards against arbitrary dismissal or reduction in rank. u/s 240, Government of India Act, 1935, the safeguards were limited to those two cases. Under the present Constitution, a third was added, namely, removal from service. In order to understand the difference between "dismissal" and "removal" from service, it will be necessary to turn to the Rules which governed, and with modifications, still govern, the "services" in India because of Article 313 of the Constitution;

Part 12 of the Civil Services (Classification, Control and Appeal) Rules relating to Conduct and Discipline includes Rule 49 which sets out the various penalties to which a member of the services can be subjected for indiscipline and misconduct. They are seven in number and include censure, suspension, reduction in rank, removal from service and dismissal from service. The Act of 1935 selected only two of these possible penalties as serious enough to merit statutory safeguards, namely, reduction in rank and dismissal from service.

The Constitution has added a third to the list. The distinction which is drawn between the two is explained in Rule 49. There is first "removal" from service "which does not disqualify from future employment" and there is next dismissal from service "which ordinarily disqualifies from future employment."

Then follows an explanation:

The discharge:

(c) Of a person engaged under contract, in accordance with the terms of his

contract, "does not amount to removal or dismissal within the meaning of this rule."

These terms are used in the same sense in Article 311. It follows that the Article has no application here and so no question of discrimination, arises, for the "law" whose protection the petitioner seeks has no application to him."

8. From the aforesaid observations it is clear that Sub-section (2) of Section 240, the Government of India Act, 1935, has no application to removal from the service or termination of the services of an employee in pursuance of the terms of his contract; I shall presently show that the services of the petitioner were terminated not by way of penalty as a result of any disciplinary action but in pursuance of the terms of his contract of service.

It is indeed true that the termination of the services of the petitioner has the effect of removal but it is worthy of note that like Rule 43 of the Civil Services (Classification, Control and Appeal) Rules, the rules in the Railway Establishment Code also make a distinction between dismissal and removal. "The distinction is given in Rule 1703 in Chapter XVII at page 1703 of the Indian Railway Establishment Code, Volume I. The rule says:

"Dismissal from service shall disqualify the railway servant from future employment but removal from service need not be considered an absolute disqualification."

Sub-section (2) of Section 240, Government of India Act, 1935, provides a safeguard in favour of a member of the civil service in India, or the holder, of a civil post under the Crown in India, against dismissal within the meaning of the aforesaid rule. Sub-section (2) of Section 240 of the Government of India Act, 1935, does not contain any safeguard against removal from service within the meaning of the aforesaid rule, far less against removal from service as a result of the termination, of the services of a Government employee in accordance with the terms of his service. The petitioner was not, therefore, entitled to any protection under Sub-section (2) of Section 240 of the Government of India Act, 1935. The first point urged on behalf of the petitioner must be overruled.

9. With regard to the regulations regarding disciplinary action against non-gazetted staff, including removal from service, dismissal and rights of appeal, we have been referred to the rules printed in Section II of Chapter XVII of the Indian Railway Establishment Code, Volume I. Rule 1702 of the said rule gives a list of Penalties which for good and sufficient reasons may be imposed Upon railway servants. Rule 1703, which I have already quoted, draws a distinction between dismissal and removal. Rule 1704 gives a list of the authorities competent to impose the aforesaid penalties.

It is specifically stated that Rule 1704 is subject to the provisions of Rule 1705. Rule 1705, so far as it is relevant for our purpose, says in Clause(c) that no railway servant shall be removed or dismissed by an authority lower than that by

which he was appointed to the post held by him substantively. Mr. B. C Ghose, appearing on behalf of the petitioner, has laid great stress on Clause (c) of Rule 1705. He has pointed out that under a letter of the Railway Board dated 15-5-1948, it was held that in respect of employees of the former Company managed Railways, the Officer of employment (sic) under the State Railways was made by the General Managers concerned and not by any Subordinate authority; therefore an employee so appointed could be discharged only under orders issued by the General Manager himself "and not by any lower authority.

This letter of the Railway Board has been given as an annexure, namely, Annexure A of the supplementary affidavit filed on behalf of the petitioner. Learned Counsel for the Railway authorities has not challenged before us the fact that such a letter was issued by the Railway Board, Mr. Ghose's contention, therefore, is that under Rule 1705, Clause(c), no authority other than the General Manager could have dismissed or removed the petitioner from service.

Mr. Ghose argues that the schedule of powers under which the General Manager has delegated to certain senior-scale officers power to make substantive appointments in non-gazetted posts and to punish non-gazetted officers has no application to the facts of the present case; because under the aforesaid letter of the Railway Board dated 15-5-1948, the General Manager alone was competent to dismiss or remove the petitioner from service.

10. The argument of Mr. Ghose, I must concede, has a good deal of plausibility; but the argument proceeds on the assumption that the rules in Section II of Chapter XVII of the Indian. Railway Establishment Code apply to the present case. In my opinion, that assumption itself is incorrect. The rules in Section II of Chapter XVII of the Indian Railway Establishment Code apply when any of the penalties mentioned in Rule 1702 is being imposed on a railway servant.

Where, however, the services of a railway servant are being terminated not by way of penalty but in pursuance of the terms of the agreement of service, no question of the application of the rules in S. II of Chapter XVII of the Indian Railway Establishment Code arises. If, therefore, we hold that the petitioner in the present case was removed from service as a result of the termination of his services in accordance with the terms of his service agreement, then it is unnecessary to consider the rules in Section II of Chapter XVII of the Indian Railway Establishment Code.

Mr. Ghose has contended before us that though the removal notice states that the services of the petitioner were no longer required by the administration, yet the real reason for the termination of the services of the petitioner was for the purpose of imposing a penalty on him for unauthorised absence from duty on 19-11-1947 and 25-12-1947. Mr. Ghose has drawn our attention particularly to paragraph 5 of the counter-affidavit filed on behalf of the Railway authorities. In paragraph 5 it was stated:

"The petitioner received the charge-sheet (referring to the charge-sheet

regarding absence from duty on 25-12-1947) but did not care to submit any explanation to the same and continued to remain absent as before. As it was of no use keeping the petitioner in the Railway service any further on account of his continued absence from duty, the Railway Administration had no alternative but "to dispense with the petitioner's services, and thereafter the petitioner's services were terminated by the notice marked Annexure B to the petition"

Mr. Ghose has also drawn our attention to R. 1708 of the Railway Establishment Code, which states inter alia that a railway servant shall be liable to be removed from the service for absenting himself or overstaying sanctioned leave, without sufficient cause. The counter-affidavit filed on behalf of the Railway authorities must be read as a whole. In paragraph 4 of the said, affidavit it was stated:

"The petitioner was not illegally removed from service as alleged by him, but his services were terminated in accordance with his service agreement and conditions of service, which would be evidenced from the, notice of termination itself. No stigma or any infamy or misconduct was attributed to the petitioner in the said notice, as would appear from the notice itself."

When a Government employee holds his service on condition that his service may be terminated at any time with one month's notice on either side, the mere fact that certain charges have been made against the employee does not by itself show that the termination of the services of the employee is by way of penalty. Mr. Bose appearing on behalf of the Railway authorities has placed before us a certified copy of a decision of the Calcutta High Court in Civil Rule No. 3558 of 1953 decided by a Single Judge of the Calcutta High Court on 11-5-1954 (Cal) (B).

A question similar to the one raised before us was considered in that case. His Lordship of the Calcutta High Court made the following observations with regard to the question whether the termination of services is by way of punishment or not:

"Whether the termination of service is by way of punishment or not must be a question, of fact & must depend on the circumstances and intention of the parties. I am, however, unable to agree with Mr. Chatterjee that whenever there has been a departmental enquiry, it must follow that the removal was by way of punishment. As the conditions of service stand, the Railway authorities in terminating the services of a non-pensionable non-gazetted servant need not advance any reason nor take the trouble of holding a departmental enquiry.

Merely one month's notice would be enough. But a public body like the Railway cannot act capriciously and therefore if in order to determine as to whether any action should be taken, holds an enquiry giving the employee the fairest opportunity of explaining his conduct, I do not think that it is necessarily waiving its right of proceeding in accordance with the terms of service as laid down in the Railway Establishment Code. The real object of differentiating between a punishment and a mere removal according to terms of service lies in the effect of

the order.

In the case of punishment the employee's reputation is lost, and in the case of a dismissal, there is a bar to obtaining fresh service under the Government. If the service of an employee is simply terminated in accordance with his term of service, there is neither any infamy nor a bar to re-appointment. In my opinion, the most important document to see as to whether the Railway has proceeded by way of punishment or otherwise, is the order terminating the service.

In the present case the order does not show that the railway was proceeding to act by way of punishment. It is not stated in the order that the petitioners have been found guilty and they were accordingly removed by way of punishment".

If I may say so with great respect, I agree with the aforesaid observations of his Lordship of the Calcutta High Court. In the case under our consideration also, the order terminating the services of the petitioner does not show that he has been found guilty of any charge; on the contrary, the order clearly and simply states that the services of the petitioner, are no longer required by the administration and, therefore, he is being given one month's notice.

11. Having given my best consideration, to the facts and circumstances of the case. I am unable to agree with Mr. Ghose that the real purpose was to punish the petitioner by imposing a penalty on him. It seems to me that the Railway authorities found the petitioner to be unsuitable for one reason or another, and accordingly they decided to terminate the services of the petitioner in accordance with the terms of his service agreement.

In this view of the matter, the regulations regarding disciplinary action against non-gazatted staff contained in the Indian Railway Establishment Code have no application in the present case. The matter rests wholly in contract and no question of the violation of the said regulations arises.

12. I now turn to the service agreement of the petitioner which is Annexure A of the substantive application of the petitioner. It is sufficient to quote the first paragraph of the service agreement. The first paragraph states:

"I, Bhagwan Dass, aged on this date 27 years 2 months, etc., do hereby agree to serve the Government of India as a clerk or in any other capacity in which I may, hereafter, from time to time, be appointed and in such place on any state Railway as the Government of India may direct, such service being that of a monthly servant only & being terminable at any time after one month's notice on either side or the payment by Government of a sum equal to one month's pay in lieu of notice or on my attaining the age of 55 years, unless previously informed that an extension of service has been granted."

This service agreement which embodies the conditions of the petitioner's service makes it quite clear that the service of the petitioner was terminable on one month's notice on either side or payment of one month's salary in lieu of notice; his service was also terminable on attaining the age of 55 years. In the present

case the services of the petitioner have been terminated on one month's notice. Mr. B. C. Ghose has contended before as that the notice has not been given by the proper authority, namely the General Manager of the Railway concerned.

I do not think that the service conditions of the petitioner require that the notice must be given by the General Manager; any subordinate officer acting on behalf of the principal could have given the notice on behalf of the principal. In the present case the notice was given by the officer under whose direct control the petitioner was. The petitioner has stated in his application that his petition dated 19-6-1950, was sent to the General Manager and a communication was received from the General Manager to the effect that no action was needed on the petition of the petitioner dated 19-6-1950.

The General Manager has been made a party to the present application and it is act contended on behalf of the petitioner that the notice which was given to the petitioner had not the concurrence of the General Manager. The Railway authorities, including the General Manager, are contesting the application of the petitioner.

13. Then there is another aspect of the matter. Let us assume that there is some irregularity in the matter of the notice given to the petitioner, in accordance with the terms of his service agreement. That, irregularity, if any, may give the petitioner a case of action for claiming damages. According to the service agreement of the petitioner, he is entitled to one month's salary in lieu of notice; and if the notice has not been properly given, the petitioner may, if he is so advised, make a claim for such compensation as he thinks he is entitled to, in a properly constituted suit. I do not, however, see how the petitioner can be reinstated or how we can issue a writ directing that the petitioner be reinstated to his post. Then there is a third difficulty.

According to the counter-affidavit of the Railway authorities, the petitioner was due to retire in the ordinary course on 14-9-1953. It is true that the petitioner has denied this statement in the counter-affidavit. But the petitioner has not stated when he was due to retire. The service agreement says that the petitioner was aged 27 years 2 months and odd days on 29-10-1925. Therefore, he was due to retire sometime in September, 1953. According to his service agreement, the petitioner's services were to terminate on his attaining the age of 55 years. It is difficult to see how in these circumstances the petitioner can now pray for the relief that he should be reinstated to his old post.

14. Speaking for myself, I do not think that this is a fit case in which any writ under Article 226 of the Constitution can issue to give effect to the prayers made by the petitioner. The petitioner was removed from service in 1948. He apparently, accepted the removal notice and asked for the payment of all his dues, including Provident Fund etc. It appears that all his dues etc. have been paid and the petitioner has accepted such payment. The petitioner did not do anything till 19-6-1950., when he sent a petition to the Divisional Superintendent.

That petition I have already referred to in a previous part of this judgment. The petition cannot be considered to be an appeal by any stretch of imagination. The petitioner then waited for four years, and after he had reached the age of superannuation he made an application for the issue of a writ to this Court. In my opinion, it would be an abuse of the power given to us under Article 226 of the Constitution to issue a writ in respect of an order of removal passed against the petitioner in the year 1948, which order the petitioner apparently accepted without demur at least till 19-6-1950.

Learned Counsel for the Railway authorities has cited before us several decisions in support of his contention that Article 226 has no retrospective effect and cannot be applied in respect of an act which had become final before the coming into force of the Constitution of India. Mr. Ghose has placed before us certain decisions where it has been held that if the wrong committed continues after the coming into force of the Constitution of India the aggrieved party can ask for a writ under Article 226 of the Constitution to remedy the wrong which he is suffering from after the coming into force of the Constitution.

I do not think that it is necessary to examine those decisions in detail in the present case. Article 226 no doubt gives this Court a power to issue directions, orders or writs for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. The power is subject to a two fold limitation, namely, (1) no writ can run outside the territorial jurisdiction of the Court, and (2) the writ can issue only to any person or authority within the territories of this Court. But the exercise of the power is discretionary, except in the matter of enforcement of fundamental rights.

In the case under our consideration no writ can issue because the petitioner waited from 1948 to 1954 without taking necessary action against the order of which he now makes a complaint. On the contrary, the letter which the petitioner wrote on 30-7-1948, to which I have already made a reference, shows that the petitioner accepted the notice and asked for the payment of all his dues, which dues, it appears, have been, paid and accepted by the petitioner.

The petitioner attained the age of retirement in September, 1953, and made his application for reinstatement in 1954, that is, several months after he had reached the age of retirement. In these circumstances it would, in my opinion, be an abuse of the power given to us under Article 226 of the Constitution to issue a writ in favour of the petitioner.

15. There has been some controversy before us as to whether a notice u/s 80, Civil P. C., was served on the Railway authorities on behalf of the petitioner. The Railway authorities have said that they received certain notices on behalf of the petitioner given by a lawyer named R. P. Varma. The petitioner has denied that he had given any such notice. Certain other statements made in the counter-affidavit filed on behalf of the Railway authorities have also been called in question.

A separate application has been filed on behalf of the petitioner for taking necessary action against certain statements made in the counter-affidavit which are characterised as false statements. That application will be dealt with separately in due course, and I do not propose to say anything about that application in the present Judgment.

16. For the reasons which I have given above, I have reached the conclusion that no case for the issue of a writ has been made out in this case. The application is accordingly dismissed with costs. Hearing fee Rs. 100/- only.

Kanhaiya Singh, J.

17. I agree.