

(1984) 08 PAT CK 0012

In the Patna High Court

Case No : Appeal from Appellate Decree No. 703 of 1979

Chandra Bhushan Tewary

APPELLANT

Vs

The Union of India and Other

RESPONDENT

Date of Decision : 16-08-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Constitution of India, 1950 — Article 311(2)

Citation : (1985) PLJR 1006

Hon'ble Judges : S.B. Sanyal, J

Bench : Single Bench

Advocate : Shri Prakash Rai, for the Appellant; A.B. Ojha, for the Respondent

Judgement

S.B. Sanyal, J.—This second appeal is directed against a judgment of affirmance arising out of a suit for declaration that the order of termination of service of the appellant with effect from 14.8.1967 is void, illegal and unconstitutional. The reason for the said declaration is that the order of termination of service was not preceded by a departmental inquiry in accordance with the principles of natural justice and in the eye of law, as the petitioner was never served with a notice of the departmental inquiry, it will be deemed that the departmental inquiry was never initiated, pursuant to which he was found guilty and accordingly dismissed. The misconduct alleged is of not carrying out the order of transfer of the appellant from Sakrigali Ghat in Jamalpur Division to Howrah Division, without any legal and valid ground. The plaintiff came to know about the termination of his service on 24.9.1969 when he was asked to deposit his kits and uniform, and in the said letter there was a reference to the order of removal dated 14.8.1967, and that is how he came to learn about his removal from service. The defendants, on the other hand, contended that the removal of the appellant was pursuant to a departmental inquiry held in consonance with the principles of natural justice, but the appellant avoided participating in the said departmental inquiry and, therefore, it had to proceed ex parte. Further case of the defendants is that the order of transfer of the appellant was within jurisdiction, valid, legal

and the reason for not carrying out the order of transfer is not valid. It was further contended that the notice given u/s 80 of the CPC was not legally and properly served on the defendants and, therefore, the suit is not maintainable.

2. The plaintiff is a Rakshak of the Railway Protection Police Force posted at the relevant time at Sakrigali Ghat of the Eastern Railway. There was an order of transfer on 16.5.1966. He filed a representation against the order of his transfer because of the illness of his wife and the educational problem of his children. He was again directed to report to Howrah on 14.9.1966. It appears that on 3.9.1966 the appellant tendered his resignation which, however, was not accepted by the Railways on 31.10.1966. The plaintiff received the charge-sheet on 8.2.1967. He filed his show cause to the charge-sheet. Thereafter inquiry was set up with Mr. N. R. Chatterji as the Enquiring Officer to conduct the inquiry and to submit his finding at an early date. Notice of the inquiry and the dates of sitting of the Enquiring Officer are said to have been issued Vide Exts. A series, but the notices of the inquiry were never served on the plaintiff. The notices returned with notes of the Postal Peon "Gone out, not met. Deposit for 4 days etc." It is also admitted fact that none of the notices issued by the Enquiring Officer was ever served on the plaintiff.

3. So far the question of service of notice u/s 80 of the CPC the postal receipts and the notices issued which have been exhibited in the case. The lower appellate Court recorded a finding that non-service of the notice of the departmental inquiry had not vitiated the said inquiry as the plaintiff appeared to have evaded and avoided to receive, notice issued through the Postal peon. According to the lower appellate Court, the plaintiff could not have been compelled to remain at his house and receive the notice. Sending of the notice by registered cover at the correct address fulfils the requirement of the principles of natural justice in relation to the domestic inquiry conducted in the case.

4. So far as the service of notices u/s 80 of the CPC is concerned, the same have been marked Exts. 6 to 6/2. The Court below held that there is no connecting evidence to show the service of the said notices. Therefore, legal and proper notices u/s 80 of the CPC were not served upon the respondents.

5. Mr. Rai, learned counsel appearing for the appellant, submitted that the order of dismissal per se is violative of Article 311(2) of the Constitution of India. The appellant under the law was not only required to be informed of the charges against him, but he was further entitled to a reasonable opportunity of being heard on those charges. According to the learned counsel, notices were admittedly not served upon the appellant. The observation of the lower appellate Court that the appellant must have avoided to receive the notices is a surmise and conjecture in absence of any positive evidence of the postal peon to the said effect. Learned counsel submitted that during the same time notices were served upon the appellant to participate in criminal cases instituted by the Railway Protection Force, namely, Exts. 3 and 3/a. As notices were served on the appellant through Government Railway Protection Force, the Enquiring Officer, if

he at all wanted to get the notices served, could have resorted to the same mode. He further contended that the notices could have been published in the newspaper and/or in the Gazette for information of the appellant stating the date of the inquiry, if the said notices could not be served upon the appellant. In short, the learned counsel contended that it is not the case of the appellant that the appellant ever refused to accept the notices, but his case is that notices were never served nor the serving peon was examined in the case.

6. So far as the question of service of notice u/s 80 of the CPC is concerned, learned counsel contended that the appellant having produced the registered cover and office copy of notice under the cover, the postal receipt of despatch of the registered cover containing the said notice, which have all been exhibited in the case, it was for the defendant to prove that the said notices were really not served upon the defendant Railways. Even the pleadings, according to the learned counsel, do not state that the notices were never served, but what has been stated in the written statement is that it was not "legally" and properly served on all the defendants". The stand in this regard is too vague to non-suit the plaintiff.

7. Mr. Ojha, learned counsel appearing on behalf of the Railways, contended that the findings of the two Courts below that the plaintiff evaded acceptance of the notice cannot be interfered with in second appeal. The two Courts below have concluded that all possible steps were taken by the Railways for serving the notices of the departmental inquiry. There remained nothing for them to do in this regard. He contended that the plaintiff had already resigned and, therefore, he had no interest in the inquiry to be held. The authorities were satisfied about the avoidance, resorted to by the plaintiff, and, therefore, resort to publication of the notice was not taken. He further contended that the mere omission of "Ghat Road" from the address of the plaintiff is of no consequence as the mention of "Coolipara" in the envelope was sufficient enough for the peon to approach the residence of the plaintiff. From the Peon's report, it appears that the addressee was not found in the house. In the facts and circumstances of the case, according to the learned counsel, the finding recorded by the Courts below should not be interfered with. He further contended that Exts. 3 and 3/a, notices issued by the prosecution to a witness, are wholly irrelevant in this context. Learned counsel submitted that admittedly the order of transfer has not been carried out by the plaintiff. The reason assigned for not carrying out the order of transfer has been found by the Courts below to be not genuine and valid. According to the learned counsel, even if it be assumed that there was no inquiry by the departmental authorities, the plaintiff had adequate opportunity to establish his defence in the Civil Court and the said Court having made an inquiry and being of the view that causes assigned by the plaintiff being not germane, the order of dismissal pursuant to the departmental inquiry does not call for interference by this Court. So far as notice u/s 80 of the CPC is concerned, learned counsel contended that the appellant ought to have examined the postal peon in order to maintain the suit. Mere production of the registered cover as

well as the receipt and the copy of the notice did not establish the service of the notice upon the defendants.

8. A person is entitled to the protection of Article 311 of the Constitution. His services cannot be terminated for misconduct without intimation of the charge and a departmental inquiry held in regard thereto in accordance with the principles of natural justice. He shall have to be provided with reasonable opportunity of being heard in respect of those charges. In Industrial Disputes cases, however, when a departmental inquiry either is not held or, even if held happen to be not free from blemish, the employer is entitled to justify the action by adducing evidence before the Industrial Tribunal and Labour Court, as the case may be. See:--

1. Management of Ritz Theatre (P) Ltd. Vs. Its Workmen,
2. Delhi Cloth and General Mills Co. Vs. Ludh Budh Singh,
3. The Workmen of Firestone Tyre and Rubber Co. of India (Pvt.) Ltd. Vs. The Management and Others,
4. The Cooper Engineering Limited Vs. Shri P.P. Mundhe, and
5. Shankar Chakravarti Vs. Britannia Biscuit Co. Ltd. and Another,

In my opinion, this principle, however, has no application to a person who has the protection of Article 311(2) of the Constitution. The language of Article 311(2) is in absolute term, i.e. "no such person as aforesaid shall be dismissed or removed, or reduced in rank except after an enquiry in which he has been informed of the charges and given a reasonable opportunity of being heard in respect of those charges..." This provision is mandatory and not permissive. It is, therefore, incumbent for the employer to prove that such an opportunity was actually provided to the concerned person.

9. In the instant case, the Courts below have referred to the issuance of the notice and the return of the notice with a note, i.e., "appellant not met". It is true that more than one attempt had been made in this regard. The Enquiring Officer seems to be of the view that this would mean service of notice of inquiry upon the concerned person. He did not resort to other known method and manner of publication of notice of such a departmental Inquiry. It has been held almost two decades back in the case of The Bata Shoe Co. (P) Ltd. Vs. D.N. Ganguly and Others, when registered notices came back unserved the proper course was to publish the notice in the name of concerned workers in some newspaper in regional language with a wide circulation in the area along with the charges framed. I am surprised how the Courts below could conclude from non-service of the notice, that the appellant was evading service of the notice. Even the postal peon has not been examined by the Railways in the case. There has been only reference to the resignation letter of the plaintiff-appellant. In the said resignation the plaintiff did not admit his guilt, nor the said resignation was accepted by the Railways. As the resignation letter was not accepted by the

Railways, they initiated the instant departmental inquiry. This was required to be carried out in conformity with the principles of natural justice. The service of charge and the notice of departmental inquiry is sine qua non for a valid inquiry into delinquency of a person. If such a notice is not served, in the words of Lord Denning in the case of *Firman vs. Ellis* (1978) 3 W.L.R. 1, it is a nullity, "in point of law no action had been commenced against the Smiths." In *Anisminic case* (1969) 2 A.C. 147 at 170, the House of Lords has made it clear that there are no degrees of nullity and that an error in breach of natural justice involves excess of jurisdiction and, therefore, nullity. Lord Diplock has made it clear that "void" is the correct term in any such context (See *Hoffman La Roche vs. Secretary of State for Trade Industry*, 1975 A.C. 295). It is, therefore, crystal clear that the conclusion as to the delinquency of the employee is void and nullity. It is ultra vires Article 311 of the Constitution of India

10. The argument of Mr. Ojha is all that the plaintiff could have said before the departmental authorities in support of his case have been looked into by the Civil Court and found to be groundless and, therefore, if there is any infirmity in the order dismissing him from service, it has been cured by the findings recorded by the Civil Court. I am not impressed with this argument. As stated earlier, an order which is void, cannot be cured by a subsequent act. The law in this regard as propounded in Industrial Jurisprudence is wholly inapplicable to a Government servant entitled to the protection of Article 311. As stated earlier, post fact inquiry by Tribunal or Labour Court in an industrial case is permissible, but it is impermissible in a case of Government servant. I am, therefore, of the opinion that the order of dismissal is ultra vires Article 311(2) of the Constitution of India. There could be no valid termination of service of the plaintiff and he is, therefore, entitled to the declaration that the termination of his service is void, illegal, inoperative and without jurisdiction, in point of law, no action will be deemed to have been commenced against the plaintiff.

11. So far, as the question of service of notice u/s 80 of the CPC is concerned, the plaintiff has produced the receipt of having despatched a registered cover with the office copy of the notice to the defendants. The office copy of the notice and the postal receipts have all been marked and exhibited. There is a presumption that such a notice must have been served. It is not the case of the defendants that the notice was returned unserved. In that view of the matter, the conclusion of the court below that the plaintiff was required to prove something more than mere production of the postal receipt and the office copy of the notice does not appeal to me at all. The stand of the Railways is not that the notices were not served, but they were not legally and properly served on all the defendants without disclosing to whom notice was not served. I find that there are more than one defendant in the suit and the service of notice on the Union of India through the General Manager is sufficient enough to discharge the liability cast u/s 80 of the Code of Civil Procedure. In the result, the appeal is allowed. The order terminating the service, of the appellant is held to be void, inoperative and without jurisdiction and the plaintiff will be deemed to be in service

irrespective of the order of removal dated 24.8.1967. There will be no order as to costs.