
(1989) 05 CAL CK 0057
In the Calcutta High Court
Case No : Matter No. 5062 of 1987

Dipty Prosad

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 04-05-1989

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2), 32

Citation : (1989) 2 CALLT 364

Hon'ble Judges : Monoranjan Mallick, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.R. Mallick, J.—The petitioner who was lately posted as Senior Rakshak presently designated as Naik in 1978 was posted at Asansol under the Railway Protection Force. On 4-2-85, when he was posted at Down Departure line Andal there was a microphonic announcement from the office of the Assistant Yard Master that the petitioner was required to see the Rakshak on duty. When he rushed to the Head Rakshak he was informed that his elder brother was lying seriously ill at N.R.S. Hospital Calcutta. On receiving the message, he applied for 7 days casual leave and submitted the application to the Assistant Sub-Inspector-in-charge. Down Departure Yard for making proper treatment of his elder brother. On seeing the serious illness of his elder brother, the petitioner got upset and started feeling unwell and left for his native village.

2. The petitioner who was already mentally upset because of the sudden demise of his wife in 1982 became mentally deranged consequent upon the said serious illness of his elder brother. In view of such mental derangement he got treatment of a local doctor for some time. As his condition did not improve he had to be taken by his neighbours and the relations seriously in the said village for treatment of mental illness at the mental hospital at Tara Bhawan Ranchi under the treatment of Dr. Mukesh Kumar Sinha, Assistant Civil Surgeon. He remained under his treatment from 13-2-1985 to 3-4-1986 when he was declared fit for

duty upon recovery of: mental illness. Upon such recovery, he came to Andal for resuming his duty on or about 5-4-1986 but he was not allowed to join. He came to learn that Senior Commandant Railway Protection Force, Asansol had issued an order of removal of his service in purported exercise of power under Rule 47(b) of the Railway Protection Force Rules, 1954 (hereinafter referred to as the said Rules) read with paragraph 13 of the Chapter XVI of the Railway Protection Force Regulations 1966. The petitioner complains that no copy of the order of removal of service has been communicated to him.

3. Thereafter, the petitioner was constrained to file an appeal under Rule 52 of the said Rules on 14th April, 1986. But the appellate authority illegally and without considering all the relevant grounds for absence shown by the petitioner and without considering the medical certificate xerox copy of which was annexed with the appeal petition refused to interfere with the order of removal of the petitioner from service and dismissed the appeal by the order dated 7-5-1987.

4. The petitioner has thereafter submitted a revisional application against the appellate order on 7-6-1987 but the said revisional application has not been disposed of.

5. The petitioner therefore prays for a direction upon the Respondent concerned to dispose of the revision petition expeditiously and also for a writ of mandamus for quashing and/or setting aside the order of removal of service dated 19-3-1986 and the order of appellate authority dated 7-5-1987 and for reinstatement of the petitioner in service with immediate effect.

6. Respondent Nos. 1 to 4 have contested the writ petition and the affidavit-in-opposition on behalf of all of them has been affirmed by Mr. M. Mohan Senior Commandant Railway Protection Force, Asansol, Eastern Railway. The Respondents' case may be briefly stated as follows.

7. From the office records it would be evident that the writ petitioner was detailed for duty from 00/00 hours (12 midnight) to 08/00 hours (A.M.) on 5th February, 1985 at Down Departure Yard, Andal. He was in posting duty at the said place under Assistant Sub-Inspector of in-charge. But he did not turn up for duty and continued to remain absent from duty without any intimation or authority. He neither informed any one nor did he submit any applications for grant of 7 days casual leave to the competent authority at any point of time, before absenting from duty or thereafter. It is denied that the petitioner left the place of duty on getting information from Head Constable to the effect that his elder brother was lying seriously ill at N.R.S. Medical College Hospital. It will be evident from the record that one of his brothers died at Calcutta in a hospital on 25th May 1980 and not in February, 1985 when the petitioner unauthorisedly absented himself from duty. The petitioner's wife died in the year 1982. The said death could not be ground for his remaining absent from duty in February, 1985. If the petitioner were really ill there was sufficient medical facility in the Railway Hospital and there was no ground for him to go to his native village on being

mentally upset. Both the disciplinary authority and the Appellate authority were convinced that the petitioner absented himself from duty on and from 4th February, 1985 till 3rd April, 1986 without any reasonable cause and without making proper application. The petitioner has deserted the place of duty as well as the Head Quarters on his own accord and absented himself without any permission from the competent authority. The reasons for such absence were not cogent and reasonable and as such the disciplinary authority rightly removed him from service. It is also submitted that the petitioner not having exhausted all the remedy the writ petition is liable to be dismissed.

8. On behalf of the petitioner it is urged that there was no sufficient reason for the disciplinary authority for invoking Rule 47(b) of the said Rules of dispensing with the disciplinary proceeding under Rule 44, that there was no justifications for the disciplinary authority for dispensing with such enquiry and consequently the impugned order of removal from service is illegal and the said order and the order of appellate authority approving such order is liable to be set aside. It is contended that the Supreme Court in *Union of India and Another Vs. Tulsiram Patel and Others*, has considered the similar provision in Clause (b) of the second proviso to Article 311(2) of the Constitution of India and Rule 14 of the Railway Servants Rules. Rule 19 of the Civil Services Rules and Rule 37 of the CISF Rules and. has observed in para 130 at pages 1478-79 and has illustrated the circumstances under which the disciplinary authorities can dispense with such enquiry and according to Supreme Court where due to threat of terrorisation by the employee and his colleagues it was not possible to hold the enquiry then the enquiry officer could dispense with such enquiry.

9. I have carefully considered para 130 of the said decision. The Supreme Court has clearly indicated therein that it is not possible to enumerate the cases in which it would not be reasonably practicable to hold the enquiry, but some instances by way of illustration may, however, been given. Some illustrations were given in para 130 which are by no means exhaustive and only illustrative. These instances were given by the Supreme Court in the context of the cases which are subject matter of appeals before the Supreme Court when during Railway strike due to threat, intimidation and other abnormal situations the departmental enquiry could not be possible to remove those Railway servants from service. It is to be noted that in para 132 the Supreme Court has also considered the situations when even after starting with the enquiry the authority has to dispense with such enquiry. The whole para 132 at page 1480 is reproduced below

It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case

also the disciplinary authority would be entitled to apply clause (b) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).

10. In that decision Supreme Court has clearly observed that before passing the order of dismissal or termination of service without holding departmental enquiry by invoking the special rule to that effect it is incumbent upon the Disciplinary authority to give a reasoned order for dispensing with enquiry before passing such order of dismissal or removal of service.

11. It is however indicated that there is no bar to the Disciplinary authority to indicate such reason in the very order of dismissal or removal. It is also indicated that the remedy of the Government servant lies in preferring an appeal against such order and also to move the High Court under Article 226 of the Constitution or to Supreme Court under Article 32 of the Constitution. Such order is subject to judicial review and the finality given to the decision of the disciplinary authority is not binding upon the Court and so far as its power of judicial review is concerned in appropriate case the Court will strike out the order dispensing with the enquiry and the imposing the penalty.

12. I would presently discuss as to whether in the circumstances of the present case there was justification for the disciplinary authority to dispense with the enquiry and whether adequate reasons were assigned for dispensing with the enquiry. Before that I would decide the preliminary point by the Respondent, namely, the writ petition is not maintainable as the petitioner has moved the Court before exhausting all the remedies given in the said Rules. The Respondents have disclosed during hearing that revision petition has since been dismissed by the order dated 14-3-89. The copy of such order has been placed before the Court along with the personal file of the petitioner. Now that the revision petition has been dismissed. The Writ petition cannot be dismissed on the ground that the same has been filed before the disposal of the revision petition. According to Respondent the petitioner or Senior Rakshak of the Railway Protection Force left his place of duty without any intimation with effect from 4-2-1985 and remained in unauthorised absence for more than one year, that he was contacted in his village address and was asked to return to duty immediately but that letter was returned unserved with the postal endorsement that he was

living elsewhere, that thereafter the Disciplinary Authority took the view that as his whereabouts were unknown there could be no useful purpose in initiating the departmental enquiry against him, that his absence on duty amounts to desertion from his duty for more than a year and that in that view the disciplinary authority by the order dated 19-3-1986 gave the reasons as to why he was dispensing with the enquiry and then removed him from his service. It is also stated that the copy of the order was sent to his native village but the same could not be served and the letter sent by registered post had been returned unserved. The petitioner however states that on receiving the loud speaker announcement that his elder brother was lying seriously ill he went to Calcutta on taking 7 days casual leave, that there in Calcutta on seeing such serious illness he got upset and returned his native village where he became mentally deranged and had to be treated in mental hospital on Ranchi.

13. But the Once record does not show that he submitted any application for leave. The report of the Assistant Sub-Inspector in-charge of Down Departure Section, Andal Railway Station states that the petitioner did not report for duty on the midnight on 5th February, 1985 and had been absenting without leave since then.

14. The Respondents also doubt the genuineness of the claim of the petitioner that his elder brother was really ill in February, 1985. The petitioner does not produce anything in support of the same.

15. In his appeal petition he indicated that he was removed to Ranchi for treatment by his neighbours and relatives. If the same were true would he not ask any of his relatives to report about his illness to his office? The petitioner did not communicate with his office even for more than one year after he left his head quarters on 5th February, 1985.

16. Even the medical certificate produced does not indicate that his condition was so serious that he was unable to communicate with his office. "The doctor only advised him rest. The certificate does not show that he was so mentally deranged that during the whole period he could not communicate with his office and report about his alleged serious illness. The office records show that in the past also he absented himself from duty without any intimation on several occasions.

17. The disciplinary authority passed the order of removal of service dated 19-3-1986. The order is reproduced below;

Regional Order No. 6586 Dated 19-3-83.

Whereas Sri Dipody Prasad S/o Late Sheo Rajen Ram is employed as a Naik/1034 and posted at Andal (P)/Post under Inspector/HPP/UDL(P).

And whereas the Inspector/Andal (P) vide his letter No. RPF/UDL(P) E-2/86 dt. 4-2-86 reported that the said Nail had been absenting from duty as well as Hqrs. with effect from 5-2-85 without any intimation and/ or authority.

And whereas Asstt. Commandant/E. Rly/Andal vide letter No. SO/E/18/(DP) dt. 19-2-86 sent by Regd. Post directed the said Naik at his home address to report to the ACO/UDL at once but the said letter has-been returned undelivered with the remarks by postal authority that the said Naik is not available at the place of his address and resides elsewhere, the correct address of which could not be ascertained.

And whereas the said Naik has neither joined duty nor has sent any intimation till date although a period of more than 1 year has already elapsed.

And whereas the said Naik has been absenting from duty and Hqrs., on and from 5-2-85 unauthorisedly and has not joined duty nor sent any intimation inspite of issue of notice, it is presumed that he is not willing to serve in this department any longer.

And whereas the said Naik has severed all connection with the office and whereas his present whereabouts could not be ascertained inspite of attempts the circumstances of the case has become such that it is not reasonably practicable to follow the procedure prescribed under Rule 44 of RPF Rules 1959.

And whereas the undersigned after careful consideration of the merit of the case is fully satisfied that the said Sri Dipty Prasad is guilty for gross misconduct in that he had withdrawn from duty and/or deserted his place of duty as well as Headquarters and had been absenting from duty unauthorisedly without permission in a manner unbecoming on the part of a member of the Disciplined Armed Force and is not a fit person to be retained in service.

Now, therefore, the undersigned in exercise of the powers conferred by Rule 47(B) of RPF Rules 1959 read with para 13 of Chapter XVI of RPF Regulations hereby orders that Naik/1034/Ihpty Prasad of Andal(P),/Post be removed from service with immediate effect for un-authorised absence from duty on and from 5-2-85. The intervening period from 5-2-85 to till removal be treated as LWOP.

Sd.....

Dkt. No-SO/E-8(D. Prasad). Sr. Commandant/RPF/Asansol.

17A. I find that cogent reasons have been given as to why the enquiry was dispensed with. I am also of the view that when the petitioner could not be contacted at his native village and he did not disclose his present whereabouts to his office even though he was not living in the native village, the enquiry could not have been possible because he could not attend the enquiry nor could the disciplinary authority serve upon him the charge sheet. In the circumstances, the question arises as to whether the disciplinary authority as an ordinary reasonable man could have held the enquiry. In my view when the whereabouts of the petitioner were unknown and the correspondence with the petitioner could not achieve any result as he was not found at his native village which was the only permanent address found in the office record it was not possible for the disciplinary authority to send the charge sheet at his native village. If that were

sent it would have been returned unserved. Then the enquiry would not have been physically possible. The petitioner was absenting himself for more than a year. He has virtually deserted his post. He is a member of a para military force. I am not satisfied that his mental condition were such that he could not even communicate with his office even after he had left his duty without intimation and without applying for leave. He being a member of a para-military force it was definitely a grave misconduct to virtually desert his duty and remain untraced for more than a year. So the disciplinary authority in the circumstances had sufficient ground to terminate his service dispensing with enquiry under Rule 47(b). I find from the record that the order of termination was sent to his village address but it was also returned unserved as he was not available there.

18. It is true that the petitioner in his petition for appeal tried to explain his absence. The appellate authority in his order had considered such explanation and found it to be not at all acceptable. On perusal of such order, I find no reason to hold that his decision in rejecting the appeal is in any way arbitrary. He has assigned reasons for not accepting the explanation of the petitioner for remaining absent from duty for over one year. I find no reason to interfere with it.

19. In the result, I am convinced that there was sufficient justification for disciplinary authority to dispense with the enquiry and to remove him from the service for unauthorised absence for over a year. I am also convinced that the order of the appellate authority is also reasonable and there was sufficient justification for him to take the view that the disciplinary authority was justified in dispensing with the enquiry.

20. Thus I find no merits in this writ petition which is dismissed. 21. No order for costs is, however, passed.

22. All parties to act on a signed copy of the operative portion of this judgment upon usual undertaking.