
(2009) 06 MAD CK 0138
In the Madras High Court
Case No : Writ Petition No. 26714 of 2006

K. Devaki

APPELLANT

Vs

The Superintendent, Central Prison

RESPONDENT

Date of Decision : 09-06-2009

Acts Referred:

Constitution of India, 1950 — Article 309, 311, 311(2)
Railway Protection Force Act, 1957 — Section 10, 9(1)
Railway Protection Force Rules, 1959 — Rule 27, 44
Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 — Rule 17

Citation : (2009) 5 MLJ 107

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : P. Mohanraj, for the Appellant; P. Gurunathan, GA, for the Respondent

Final Decision : Allowed

Judgement

K. Chandru, J.—Heard both sides.

2. The petitioner has filed O.A. No. 2903 of 1997, seeking to challenge the order dated 27.11.1996 passed by the respondent, by which the petitioner's husband was declared to be a deserter and his name was struck off from the Rolls. On notice from the Tribunal, the respondent has filed a reply affidavit, dated 11.06.1997. Further, on direction from this Court, the original records relating to this case was also circulated.

3. In view of the abolition of the Tribunal, the matter stood transferred to this Court and was renumbered as W.P. No. 26714 of 2006.

4. The petitioner's husband was working as Warden Grade-II at the Central Prison, Salem with effect from 20.09.1977. He worked continuously from that date till 3.7.89. It was claimed that he suffered some mental illness and was attending to duty intermittently. In that way, he worked till 20.03.1995.

5. It was claimed by the respondent that the petitioner's husband stopped from attending to his duty from 23.03.1995. They also claimed that a telegram was received sent in his name on 26.04.1995 requesting permission to extend his leave. Since the petitioner's husband had absented from duty without any leave application, he was considered as a deserter in terms of Rule 128(2) of the Tamil Nadu Prison Manual Volume-II and therefore, it was declared that he was a deserter from duty with effect from 23.3.1995. A letter was sent to the petitioner to that effect.

6. In paragraphs 3 and 4 of the reply affidavit, it was averred as follows:

3. ...As such the applicant's husband was treated as deserter as per rules with effect from 23.03.95 vide this Office Proceedings No. 11762/G1/95, dated 01.07.95. This order was sent to the individual's address by registered post, which was returned to this office with the remarks of Postal authorities that "whereabouts not known". As per Rule 128(3) of the Tamil Nadu Prison Manual Volume-II, an application for reinstatement from an Officer whose name has been struck off as a deserter shall not be entertain unless it reaches the Superintendent or an Officer of equal rank under whom the subordinate officer was serving within two months from the date of commencement of the absence without leave and that at the end of two months, if no application for reinstatement is received and if the whereabouts of the deserter are not known, the Officer dealing with the case shall record in writing the fact that it is not reasonably practicable to give the deserter an opportunity of showing cause against his dismissal and confirm the dismissal.

4. ...Further the applicant herself sent a letter dated nil received in this Officer on 04.04.96, in which she stated that mentally affected her husband went place to place and they were searching her husband for the past one year and that the whereabouts were not known. She has also stated that finally information received on 27.03.96 that her husband's dead body was found in a village near Hosur. This is a clear proof that the petitioner herself accepts that the whereabouts of her husband was not known till his death. As the applicant's husband was deserted from service the applicant is not entitled to receive pension and other terminal benefits.

7. Since reliance is placed upon Rule 128 of the Tamil Nadu Prison Manual (Volume II) for striking off the name of the petitioner's husband from the Roll, it is necessary to reproduce the said Rule, which reads as follows:

128. Not to be absent without permission.-

(1)No subordinate officer shall be absent during the hours fixed for his attendance without the permission of the Superintendent or Additional Superintendent or Jailor. Any subordinate officer disabled from the performance of duty by illness shall give or send immediate notice to the Jailor, who shall make such arrangements as may be necessary for the performance of the duty of the disabled officer.

(2) Absence without leave for 21 days completes the offence of desertion, after which the officer's name shall invariably be struck off from the date of absence.

(3) An application for reinstatement from an officer whose name has been struck off as a deserter shall not be entertained unless it reaches the Superintendent or an officer of equal rank under whom the subordinate officer was serving within two months of the date of the commencement of the absence without leave. The Superintendent or the corresponding officer of equal rank, as the case may be, shall not reinstate a deserter (a) until the deserter has attended in person which he should do, nor later than the date prescribed by the officer dealing with the case and has given his explanation for his absence without leave; and (b) unless the Superintendent or an officer of equal rank, as the case may be, is satisfied, after such enquiry as may be necessary, that the case deserves reconsideration. At the end of two months, if no application for reinstatement is received and if the whereabouts of the deserter are not known, the officer dealing with the case shall record in writing the fact that it is not reasonably practicable to give the deserter an opportunity of showing cause against his dismissal and then confirm the dismissal. In other cases a charge shall be framed and the procedure prescribed for oral enquiries complied with, before confirming the dismissal or reinstating the deserter with or without punishment.

8. Though the Prisons Act enables the authorities to frame rules and orders in terms of the Act, whether Rule 128 can replace the statutory rules framed under Article 309 of the Constitution and whether it can dispense with the reasonable opportunity before removal as guaranteed under Article 311(2) of the Constitution is the question which has to be answered in the present case. The Supreme Court in more than one case has held that even in case of long absence, it is incumbent upon the authorities to comply with the mandatory provisions of Article 311(2) before dispensing of the service of a Government servant.

9. In this context, it is necessary to refer to the judgment of the Supreme Court in *The State of Assam and Others Vs. Akshaya Kumar Deb*, . It will be useful to extract the following passages found in paragraphs 17 to 22 of the said judgment:

17. Even if it is assumed that termination under F.R. 18 does not cause forfeiture of benefits already earned such as pension, etc., then also that will not, by itself, take it out of the category of 'removal' as envisaged by Article 311(2). The respondent was a permanent government servant. He had a right to his substantive rank. According to the test laid down by this Court in *Parshotam Lal Dhingra*⁴, the mere termination of service, without more, of such an employee would constitute his 'removal' or 'dismissal' from service, attracting Article 311(2). From the constitutional standpoint, therefore, the impugned termination of service will not cease to be 'removal' from service merely because it is described or declared in the phraseology of F.R. 18 as a 'cessation' of service. The constitutional protection guaranteed by Article 311(2) cannot be taken

away ?in this manner by a side wind?.

18. The above view is fortified by the ratio of this Court's decision in *Jai Shanker v. State of Rajasthan*. The appellant therein was Head Warder in the permanent service of Rajasthan State. On April 14, 1950, he proceeded on two months' leave. He later asked for extensions of the leave on medical grounds. He was due to join on August 13, 1950, his request beyond that date was refused. Thereafter he made further applications for leave, the last of them supported by a medical certificate. To his last and some of the earlier applications he received no reply, but on November 8, 1950, he received a communication from the Deputy Inspector General of Prisons that he was discharged from service from August 13, 1950. Departmental remedies having failed, he filed a suit challenging his removal from service. The trial court dismissed his suit. The first appellate court accepted his appeal. In second appeal by the State, the High Court restored the trial court's order. The employee came to this Court in appeal by special leave. The State relied on Regulation 13 of the Jodhpur Service Regulations which provided:

An individual who absents himself without permission or who remains absent without permission for one month or longer after the end of his leave should be considered to have sacrificed his appointment and may only be reinstated with the sanction of the competent authority.

Note: The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission.

19. It was contended by the State that this regulation operated automatically and no question of removal from service could arise because the servant must be considered to have sacrificed his appointment. It was maintained that under the regulation, the employee could only be reinstated with the sanction of the competent authority.

20. As before us in the instant case, the question that fell there for consideration was, whether the regulation was sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any. Answering this question in the negative, the Court, speaking through Hidayatullah, J. (as he then was) illumined the position thus:

The regulation, no doubt, speaks of reinstatement if (the employee) is 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 a termination of the 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. It is true that the Government may visit the punishment of discharge or removal from service on a person who has absented himself by overstaying his

leave, but we do not think that the Government can order a person to be discharged from service without at least telling him that they propose to remove him and giving him an opportunity of showing cause why he should not be removed. If this is done the incumbent will be entitled to move against the punishment for, if his plea succeeds, he will not be removed and no question of reinstatement will arise. It may be convenient to describe him as seeking reinstatement but this is not tantamount to saying that because the person will only be reinstated by an appropriate authority, that the removal is automatic and outside the protection of Article 311. A removal is removal and if it is punishment for overstaying one's leave an opportunity must be given to the person against whom such an order is proposed, no matter how the regulation describes it. To give no opportunity is to go against Article 311 and this is what has happened here.

21. The above enunciation applies to the facts of the present case. Excepting the length of the period of absence, the basic features of Regulation 13 in *Jai Shanker* case, were very similar to those of F.R. 18 now under consideration. The words "should be considered to have sacrificed his appointment" in Regulation 13, substantially correspond to the words "servant ceases to be in Government employ" in F.R. 18. Further, the import and effect of the phrase "may only be reinstated with the sanction of the competent authority" in the regulation, is largely the same as that of the opening clause "unless the Provincial Government, in view of the special circumstances of the case shall otherwise determine" in F.R. 18. The difference between the regulation and F.R. 18 as to the length of absence from duty prescribed as a condition precedent for the attraction of the respective provision, is a distinction without a difference in principle. The consequence of absence, though for different periods, envisaged by both the provisions, is the same viz. "sacrifice" or "cessation" of the absentee's service. The present case will thus be governed by the ratio of *Jai Shanker* case.

22. Recently, in *Deokinandan Prasad v. State of Bihar* a Bench of five learned Judges of this Court held that an order of termination of service passed under Rule 76 of the Bihar Service Code (which is identical in all respects with F.R. 18 in the present case) on account of the servant's continuous absence for five years without giving an opportunity to the servant under Article 311(2) would be invalid."

10. From the above rulings of the Supreme Court, it will be clear that there is no escape for the respondents to dispense with an enquiry before ordering removal of service of a Government servant. In the present case, it is an admitted fact that the petitioner had died on 28.03.1996 and he was not served personally even the so called order of desertion. No charge memo was framed against him and no enquiry was also held against him in terms of Rule 17(b) of the Tamil Nadu Civil Service (Disciplinary and Appeal) Rules, while the petitioner's husband was alive. It was after his death, the wife was making representation for

getting pension and other terminal benefits.

11. Even in cases where members of the police force were ordered to be removed for long absence, it was preceded by a regular enquiry. It was only when such an enquiry was held and punishment of removal from service was sought to be made, the Supreme Court had declined to interfere with such punishment.

12. The Supreme Court in *Mithilesh Singh Vs. Union of India (UOI) and Others*, , dealt with the case of number of police force remaining absent. The facts involved in the said case was set out in paragraph 3 of the said judgment, which may be usefully extracted below:

3. The appellant was appointed as constable in the Railway Protection Special Force on 16-4-1978. Disciplinary proceedings were initiated against him by issuing notice u/s 9(1) of the Railway Protection Force Act, 1957 (in short 'the Act?') read with Rule 44 of the Railway Protection Force Rules, 1959 (in short 'the Rules?'). Gravamen of charge against him was that he had left duties as well as Taran Taran Station without permission. He was detailed with others for Quarter Guard-cum-Station Static Guard duty on 22-5-1987. At about 1125 hrs he asked the Guard Commander to keep his arms and ammunition telling that he was proceeding home. The Guard Commander asked him not to go without permission. But disobeying the orders, he left his duty as well as Station Taran Taran without any permission. This was considered to be an act of indiscipline and carelessness in duty. His defence was that he was required to attend the wedding of his brother-in-law and, therefore, he had to leave the station in any case. It was further stated by him that he asked the Inspector-in-charge that the Adjutant had assured him about grant of leave, but the Inspector-in-charge refused to grant leave. Faced with this situation he had to leave with a view to keep his family commitments. It was also stated by him that he had handed over his arms and ammunition for safe custody. He returned after 25 days for which he had asked for leave. The authorities on completion of the disciplinary proceedings found that the charge was proved and penalty of removal from service was awarded.

13. It was in this factual background, the Supreme Court upheld the order of punishment given to a Government servant.

14. A similar question also arose for consideration by the Supreme Court in *Union of India (UOI) and Others Vs. Ghulam Mohd. Bhat*, . The factual matrix of the said case is set out in para 2 of the said judgment, which is as follows:

2. The background facts need to be noted in brief:

The respondent as a Constable in Central Reserve Police Force (in short 'CRPF?') joined the duty at Srinagar after being detailed for duty from Assam along with a group of fresh trainees. He applied for leave on 18-1-1992 which was sanctioned. He reported for duty long after the sanctioned leave period was over on

8-12-1992. Departmental proceedings were initiated for misconduct on account of overstay beyond sanctioned leave for 315 days without prior permission or sanction from the competent authority. On 21-6-1993 on the basis of the report of the inquiry officer, the competent authority passed order of removal from service. The same was challenged by the respondent by filing a writ petition in the Jammu and Kashmir High Court. By the impugned order dated 5-8-1997 a learned Single Judge held that since the respondent was proceeded against in terms of Section 10(m) of the Act read with Rule 27 of the Rules, the order of removal is without jurisdiction. It was observed that Section 10(m) only provided for minor punishment and did not provide for the punishment of removal from service. Accordingly the order of removal was quashed but, however, liberty was given to proceed in accordance with the provisions of the Act and the Rules.

15. After marshalling these facts, the Supreme Court declined to grant any relief to a Government servant concerned in the said case. The ratio laid down by the Supreme Court is found in para 9 of the said judgment, which is as follows:

9. This Court had occasion to deal with the cases of overstay by persons belonging to disciplined forces. In *State of U.P. v. Ashok Kumar Singh* the employee was a police constable and it was held that an act of indiscipline by such a person needs to be dealt with sternly. It is for the employee concerned to show how that penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show as to how the punishment could be characterised as disproportionate and/or shocking. (See *Mithilesh Singh v. Union of India*.) It has been categorically held that in a given case the order of dismissal from service cannot be faulted. In the instant case the period is more than 300 days and that too without any justifiable reason. That being so the order of removal from service suffers from no infirmity. The High Court was not justified in interfering with the same. The order of the High Court is set aside. The appeal is allowed but under the circumstances there shall be no order as to costs.

16. These steps were not taken in the case of the petitioner's husband before his removal. On the contrary, the respondent had rest contended himself by invoking Rule 128(2) of the Tamil Nadu Prison Manual without anything further being done in the case of the petitioner's husband. It is a clear case of infraction of Article 311(2) of the Constitution.

17. In the light of the factual matrix involved in the present case and the legal precedents set out above, the petitioner is entitled to succeed and the writ petition will stand allowed. No costs.

18. The respondent is directed to treat the case of the petitioner's husband (late S.K. Dinakaran, Warder Grade II No. 142, Central Prison, Salem) as having continued in service till 28.03.1996, the date on which he died and also consequently, direct all the terminal benefits including pension, DCRG and other benefits to be paid to the petitioner being the legal heir. However, for the period

of interregnum between 23.3.1995 till 28.3.1996, no monetary benefits will be payable to the petitioner as the petitioner's husband never discharged his duty during the period. This exercise shall be carried out by the respondent within a period of 12 weeks from the date of receipt of a copy of this order.