
(2001) 03 GAU CK 0042
In the Gauhati High Court
Case No : Civil Rule No. 42 (SH) of 1993

Kamala Rajen

APPELLANT

Vs

State of Meghalaya and Others

RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Assam State Electricity Board Employees (General Services) Regulations, 1960 — Regulation 10, 13(4), 9
Constitution of India, 1950 — Article 226
Electricity (Supply) Act, 1948 — Section 79

Citation : (2001) 1 GLT 372

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : Subir Sen, for the Appellant; S.R. Sen and P.D.B. Barua, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—The Petitioner was working as a Khalasi under the Executive Engineer, Design Division (Civil), Meghalaya State Electricity Board (for short "the MSEB"), Umiam. He applied for leave on medical ground. By order dated 16.9.1989 of the Chief Engineer (Civil), MSEB, Shillong, the Petitioner was transferred and posted as a Khalasi under the Executive Engineer, Garo Hills (Civil) Division, Tura, with immediate effect. On 28.9.1989 Executive Engineer, Design Division (Civil), MSEB, Umiam, passed an order granting earned leave on medical ground for a period of 54 days with effect from 2.9.1989 to 25.10.1989 to the Petitioner as admissible under Regulation 13(4)(c) of the Assam State Electricity Board Employees' Service Regulations, 1960, adopted by the Meghalaya State Electricity Board. In the said order dated 28.9.1989, the Executive Engineer further mentioned that in pursuance of the order dated 16.9.1989 of the Chief Engineer (Civil), the Petitioner was released from Design Division (Civil) to enable him to join in his new place of posting under the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, after expiry of his

leave. After expiry of his leave, the Petitioner instead of joining under the Executive Engineer, Garo Hills (Civil) Division submitted a joining report dated 28.11.1989 before the Executive Engineer, Design Division (Civil) at Umiam. On 13.2.1990, the Executive Engineer (Civil), MSEB, Shillong, passed an Ors. order transferring the Petitioner and posting him under the Executive Engineer, Garo Hills (Civil) Division, Tura, with Headquarters at Bajengdoba, West Garo Hills. Copy of the said order dated 13.2.1990 was marked to the Executive Engineer, Design Division (Civil), MSEB, Umiam, asking him to release the Petitioner immediately so that he could be engaged in the work taken by the said Division in Bajengdoba. Copies of the said order were also marked to the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, and to the Petitioner. Pursuant to the said order dated 13.2.1990 of the Executive Engineer (Civil), MSEB, Shillong, the Petitioner was again released by order dated 20.2.1990 from the Design Division (Civil), MSEB, Umiam, to enable him to join under the establishment of Executive Engineer, Garo Hills (Civil) Division, MSEB, with Headquarters at Bajengdoba, West Garo Hills, and the copy of the said order dated 20.2.1990 was marked to the Petitioner. The Petitioner again applied for leave for 54 days with effect from 22.2.1990 to 16.4.1990, and on 17.4.1990 submitted a joining report before the Executive Engineer, Design Division (Civil), MSEB, Umiam and did not join under the Executive Engineer, Garo Hills (Civil) Division, MSEB, at Tura. On 31.5.1990, the Executive Engineer, Design Division (Civil), MSEB, Umiam, passed an Ors. order in modification of the earlier order dated 20.2.1990 releasing him on 31.5.1990 (afternoon) from his Division to enable him to join in his new posting under the establishment of Executive Engineer, Garo Hills (Civil) Division, MSEB with Headquarters at Bajengdoba, West Garo Hills. On 12.6.1990, the Petitioner submitted an Ors. application for leave along with medical certificate on the ground that he was suffering from Tuberculosis. The said leave application was sent by the Executive Engineer, Design Division (Civil), Umiam, to the Executive Engineer, Garo Hills (Civil) Division, Tura, where he had been transferred, but the said application and Ors. papers were sent back by the Executive Engineer, Garo Hills (Civil) Division to the Executive Engineer, Design Division (Civil), Umiam as the Petitioner had not joined in Garo Hills (Civil) Division. Subsequently it appears that the Petitioner was granted leave on medical ground upto 25.1.1991 on the recommendation of the Medical & Health Officer, RP Chest Hospital, Shillong. After 25.1.1991, however, the Petitioner did not report for duty under the Executive Engineer, Garo Hills (Civil) Division. The Petitioner was then officially intimated by registered letter with A/D to join his duties within 30.11.1991 failing which his services would be terminated with effect from 25.1.1991. On 8.11.1991, the Executive Engineer, Garo Hills (Civil) Division, issued a notice to the Petitioner through the newspapers "Aphira" and "Rupang" published from Shillong informing him to join in his establishment within 30.11.1991 without fail failing which his services would be terminated with effect from 25.1.1991. The said notice was actually published in the said two newspapers. Thereafter, by notice dated 2.12.1991 published in the newspaper "Rupang", the Petitioner was

informed that since he failed to report for duty in the establishment of Executive Engineer, Garo Hill (Civil) Division, Tura, within 30.11.1991 his service stood terminated with effect from 25.1.1991. Aggrieved, the Petitioner has filed this writ petition under Article 226 of the Constitution of India praying for quashing the aforesaid notice dated 2.12.1991 of the Executive Engineer, Garo Hills (Civil) Division, Tura, terminating his services.

2. At the hearing of the writ petition, Mr. S. Sen, learned Counsel for the Petitioner, submitted that under the Rules of the MSEB, the Petitioner was entitled to 18 months leave in instalments of 4 months as he was suffering from Tuberculosis and as a matter of fact the Petitioner was granted leave upto 25.1.1991 on the basis of the recommendation of the Medical & Health Officer, RP Chest Hospital, Shillong. But even after 25.1.1991 the Petitioner continued to suffer and he applied for leave for 120 days with effect from 25.1.1991 with medical certificate and again applied for leave for 120 days with effect from 1.6.1991 with a medical certificate. Thereafter, the Petitioner submitted a leave application with medical certificate for anOrs. 60 days with effect from 27.1.1992. On the expiry of the said period of 60 days on 27.3.1992 when the Petitioner went to his place of posting at Garo Hills he was informed that he had been terminated from service by the impugned notice dated 2.12.1991. Mr. Sen submitted that the impugned notice was never served on the Petitioner. He contended that regular employees of the MSEB can only be terminated pursuant to disciplinary action and for this contention relied on Regulation 9 of the Assam State Electricity Board Employees' Service Regulations, 1960, applicable to the MSEB, (for short "the Regulations, 1960"). He submitted that under Regulation 10 of the Regulations, 1960, absence without leave or overstay of sanctioned leave without sufficient cause amounts to misconduct and since the Petitioner was suffering from Tuberculosis even after 25.1.1991 he had sufficient cause for remaining absent. He contended that the said Regulation further provides that no orders imposing a penalty shall be made unless the employee concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him. But no such opportunity was given to the Petitioner before he was terminated from service. Mr. Sen cited the decision of the Supreme Court in *Mafatlal Naraindas Barot Vs. Divisional Controller, State Transport Corporation and Another*, for the proposition that an employee is entitled to reasonable opportunity to show cause against the charge of absence without leave. According to Mr. Sen, since no such opportunity has been given to the Petitioner, the impugned notice of termination is liable to be quashed.

3. Ms. P.D.B. Barua, learned Standing Counsel for the MSEB, on the Ors. hand, contended that the service of the Petitioner has been terminated in accordance with Regulation 9 of the Regulations, 1960. She submitted that the Petitioner was in the habit of remaining absent and that despite the order of transfer dated 16.9.1989 transferring the Petitioner to Garo Hills (Civil) Division from the Design Division (Civil), Umian (Borapani), the Petitioner did not join under the Executive

Engineer, Garo Hills (Civil) Division. She submitted that still an Ors. transfer order was issued on 13.2.1990 and the Petitioner was released on 20.2.1990, but pursuant to the said transfer and release orders he did not join under the Executive Engineer, Garo Hills (Civil) Division. She stated that in the circumstances on 31.5.1990, the Executive Engineer, Design Division (Civil), Umiam (Barapani), again passed an order releasing the Petitioner to enable him to join under the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, but he did not join and instead continued to submit leave applications in the office of the Executive Engineer, Design Division (Civil), Umiam (Barapani). She argued that from the aforesaid conduct of the Petitioner it would be clear that the Petitioner continued to apply for leave only to avoid the transfer orders. She submitted that even notices were issued to the Petitioner by registered post with A/D and thereafter through the newspapers on 8.11.1991 but the Petitioner did not report for duty to the Executive Engineer, Garo Hills (Civil) Division, Tura. Ms. Barua explained that opportunity could be given to the Petitioner if he was available, but since his whereabouts were not known for a long spell of time, it was not practically possible to give any Ors. opportunity to the Petitioner, and for this reason disciplinary action against the Petitioner could not be initiated and his service was terminated by giving notice through the newspapers.

4. It is not disputed by the parties in this case that the Regulations, 1960, framed by the Assam State Electricity Board u/s 79 of the Electricity (Supply) Act, 1948, are also applicable to the employees of the MSEB, Regulation 9 of the Regulations, 1960, which provides for termination of employment is to the following effect:

9. Termination of Employment. Except as Ors. wise specified at the time of appointment in writing, the service of an employee may be terminated--

(a) without any notice--

(i) at any time, in the case of casual employee;

(ii) in the case of a probationer, during the period of probation or on its expiry;

(iii) in the case of a temporary employee, if the period of temporary employment does not extend beyond 12 calendar months, before the expiry of the said period;

(iv) in the case of all employees, if such termination is the result of disciplinary action or takes place under an agreement which specifies a date for the termination of service.

(b) with notice--

of not less than one calendar month on either side as may be specified in case of a permanent employee or a temporary employee not covered under a(i) above; provided that pay in lieu of notice may be ordered by a competent authority in any specific case.

All dues of an employee whose service has been terminated shall be paid before

the expiry of one week from the day on which his employment is terminated.

It will be clear from a reading of aforesaid Regulation 9 that service of an employee may be terminated either (a) without any notice, or, (b) with notice. Under Regulation 9(a)(iv) service of all employee may be terminated without any notice if such termination is a result of disciplinary action. Thus, the service of the Petitioner who was a permanent employee could be terminated without any notice, if such termination was a result of disciplinary action. Under Regulation 9(b) the service of a permanent employee could be terminated with notice of not less than one calendar month on either side as may be specified. The proviso thereof, however, states that pay in lieu of notice may be ordered by a competent authority in any specific case.

5. The first question for determination in this case is as to whether the service of the Petitioner has been terminated without any notice as a result of disciplinary action in accordance with Regulation 9(a), or whether his service has been terminated with notice under Regulation 9(b) of the Regulations, 1960. Notice of termination dated 2.12.1991 in Annexure-XXI to the affidavit-in-opposition as published in the newspaper the "Rupang" by which the service of the Petitioner was terminated is as follows:

Meghalaya State Electricity Board Office of the Executive Engineer, Garo Hills Division, Tura

No. GHCD/P-45/3013

Dated Tura, the 2nd Dec/91.

To

Shri Kamala Rajen Ex-Khalasi, Design Divn Me. SEB, Umiam, PO Umiam (Barapani).

Notice

Attention Shri Kamala Rajen

Because of your failure to comply with this Office Memo & No. (i) GHCD/P-45/91/1071 Dt. Tura, the 23rd Oct/91 (sent under registered cover (ii) GHCD/P-45/91/1967 Dt. 8th Nov/91 (sent under registered cover and also published in two Shillong newspapers) wherein you were asked explicitly to report for duty in the establishment of the undersigned within 30.11.91, your service is hereby terminated w.e.f. 25.1.91.

Executive Engineer (C), Garo Hills Civil Division, Me.SEB, Tura.

It will be clear from the impugned notice of termination dated 2.12.1991 quoted above that the service of the Petitioner was terminated not as a result of any disciplinary action taken against him, but on his failure to join in the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura within 30.11.1991. Mr. Sen, learned Counsel for the Petitioner, however,

submitted that in the affidavit-in-opposition on behalf of Respondents it has been stated that the service of the Petitioner had to be terminated due to wilful disobedience and insubordination of the Petitioner for not joining his place of posting despite notices and orders. But as has been submitted by Ms. Barua, learned standing counsel, MSEB, no disciplinary action in fact could be initiated against the Petitioner and the Petitioner could not be served with any show cause notice or given any opportunity inasmuch as his whereabouts were not known and in the circumstances his service had to be terminated by serving a notice dated 21.12.1991 in the newspaper.

6. Regulation 10 of the Regulations, 1960, provides for disciplinary action and punishment. In the said Regulation Acts and omissions which are treated to be misconduct have been listed and one of such misconduct listed therein is "absence without leave or overstay of sanctioned leave without sufficient cause". In the said Regulation 10 penalties which may be imposed on an employee found guilty of misconduct have also been listed and one of the penalties mentioned therein is termination of employment. The said Regulation 10 further provides that no orders imposing a penalty shall be made unless the employee concerned is informed in writing of the alleged misconduct and is given an opportunity to explain the circumstances alleged against him. Where however it is not possible to inform the employee concerned in writing of the alleged misconduct and to give an opportunity to explain the circumstances alleged against him, the Board may decide not to initiate any disciplinary action against him and instead terminate his service by way of serving a notice in accordance with Regulation 9(b) of the Regulations, 1960. Where such order of termination is challenged in the Court on the ground that the termination of employment is really a penalty without informing the employee concerned of the alleged misconduct and without giving him an opportunity to explain the circumstances alleged against him, the Board will have to satisfy the Court that in the peculiar facts and circumstances of the case it was not possible at all to inform the employee concerned in writing of the alleged misconduct or to give him an opportunity to explain the circumstances alleged against him.

7. In the instant case, it appears that the Petitioner was transferred initially by order dated 16.9.1989 from the establishment of the Executive Engineer, Design Division (Civil), MSEB, Umiam (Barapani), to the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, with immediate effect. But the Petitioner went on earned leave on medical ground from 2.9.1989 to 25.10.1989. He was however released by order dated 28.9.1989 of the Executive Engineer, Design Division (Civil), MSEB, Umiam (Barapani), to enable him to join under the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura after expiry of his leave on 25.10.1989. But the Petitioner did not join after expiry of his leave in the office of the Executive Engineer, Garo Hills (Civil), Division, MSEB, Tura and instead submitted his joining report dated 28.11.1989 before the Executive Engineer, Design Division (Civil), MSEB, Umian (Borapani), and again applied for leave. On 13.2.1990, the Chief Engineer (Civil), MSEB, passed an Ors. order of

transfer transferring the Petitioner to the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, with Headquarters at Bajengdoba and on 21.2.1990 he was released to enable him to join in the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura. But the Petitioner did not join in the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, and instead refused to accept the release order sent to his residential address by registered post with A/D. He again applied for leave with effect from 22.2.1990 to 16.4.1990 on medical ground. On 31.5.1990, the Executive Engineer, Design Division (Civil), MSEB, Umiam (Barapani), passed an order releasing him on 31.5.1990 (afternoon) from his Division to enable him to join under the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura. The said release order was sent by registered post with A/D, but the A/D card was returned with the endorsement that the Petitioner refused to receive the letter. On 8.11.1991, a notice was given in the two newspapers, the "Aphira" and the "Rupang", asking him once again to join in the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, within 30.11.1991 failing which his service would be treated as terminated with effect from 25.1.1991, but the Petitioner did not respond to the said notice. Ultimately, by notice dated 2.12.1991 published in the newspaper the "Rupang", the service of the Petitioner was terminated on the ground that he had not reported for duty in the establishment of the Executive Engineer, Garo Hills (Civil) Division, MSEB, Tura, within 30.11.1991. The aforesaid facts would clearly show that it was not possible on the part of the authorities of the MSEB to initiate disciplinary action against the Petitioner by serving a show cause notice on him and give him an opportunity to explain the circumstances alleged against him and that the only course that was open for the authorities of the MSEB was to terminate the service of the Petitioner by a notice of one calendar month under Regulation 9(b) of the Regulations, 1960. This is therefore not a case where the service of the Petitioner was terminated as a result of disciplinary action against him under Regulation 9(a)(iv) for misconduct of absence without leave or overstay of sanctioned leave without sufficient cause, but a case of termination with notice under Regulation 9(b) of the Regulations, 1960.

8. In *Mafatlal Naraindas Barot Vs. Divisional Controller, State Transport Corporation and Another*, cited by Mr. Sen, a permanent employee of the State Transport, Gujarat, had applied for extension of leave on medical ground, but his request was refused by an order dated February 15, 1962 and he was directed to report for duty at Ambaji within 48 hours of the receipt of notice failing which, he was warned, he would be removed from service. On March 3, 1962, he wrote a letter to the Divisional Controller intimating him of his inability to join duty as he was still not well and along with the letter he enclosed a medical certificate. But by order dated March 9, 1962 his service was terminated with effect from January 16, 1962 on the ground of long absence. The Supreme Court examined the Regulations which governed the service conditions of the employees of the Corporation, and found that under Clause 38 and 40 of Schedule-A to the

Regulations irregular attendance, absence without leave and without reasonable cause, and failure, without sufficient cause, to report, when directed, for duty, on the part of an employee, amounted to acts of misconduct. The Supreme Court further found that Clause 4(b) of the Schedule-A to the Regulations made it obligatory on the part of the Corporation to give to the employee a reasonable opportunity to show cause by providing him with a copy of the charge or charges as well as a statement of allegations that have been made against him, but the Corporation had not framed any charge against the employee nor conducted any inquiry. The Supreme Court held that the order of termination passed against the employee contravened the provisions of the said Clause 4(b) of the Schedule-A to a Regulations and also the principles of natural justice, and quashed the impugned order of termination.

9. In a later case of Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, an employee of the Gujarat State Electricity Board who was posted at Surat as Deputy Engineer was transferred to Ukai Sub-Division under the order of the Superintending Engineer dated March 29, 1974, and pursuant to the said order of transfer he was relieved from Surat on March 30, 1974 to enable him to join at Ukai. He made a representation to the Additional Chief Engineer for cancelling his transfer on the ground that his mOrs. aged 70 years was ailing, but his representation was rejected and he was directed to join at Ukai. He did not do so, instead he filed a civil suit at Baroda challenging the validity of transfer order. Meanwhile, the Chief Engineer by his order dated May 27, 1974 discharged him from service with effect from March 31, 1974 in accordance with Regulation No. 113. The employee challenged the said order of discharge from service under Article 226 of the Constitution before the High Court of Gujarat. The learned single Judge of the High Court quashed the order of discharge on the ground that the order of discharge was issued in violation of the basic principle of natural justice as no opportunity was afforded to him before discharging him from service under Regulation No. 113, but did not grant him any consequential relief of reinstatement or payment of back wages. On appeal, the Division Bench of the High Court directed the Gujarat State Electricity Board to reinstate the employee in service and to treat him in service without any break in service and to grant benefit of increments, seniority and promotion to which he was entitled under the Rules. On appeal by the Gujarat State Electricity Board, the Supreme Court held that the Service Regulation No. 113 provided that if any employee of the Gujrat State Electricity Board continues to remain absent from duty or overstays the period of sanctioned leave and inspite of warning, he fails to return to duty, he renders himself liable to be discharged summarily from service without complying with the procedure prescribed for taking disciplinary action, and set aside the orders of the learned single Judge and the Division Bench of the High Court of Gujarat, and upheld the order of discharge of the employee.

10. The aforesaid two decisions of the Supreme Court would show that each case has to be examined in the light of its own facts, and in the light of the Rules or

Regulations applicable to the employee who has been terminated or discharged from service, and if such Rules or Regulations empower the authorities to terminate the service of an employee without following the procedure for disciplinary action against the employee, the termination of service of the employee cannot be held to be illegal. As has been indicated above, on the facts and in the circumstances of the present case, it was not possible on the part of the authorities of the MSEB to initiate disciplinary action against the Petitioner by serving a show cause notice on him and afford him an opportunity to explain the circumstances alleged against him and that the authorities instead resorted to their powers under Regulation 9(b) of the Regulations, 1960, to terminate the service of the Petitioner with notice without initiating any disciplinary action against him. The impugned notice of termination dated 2.12.1991 therefore cannot be held to be illegal. Regulation 9(b) quoted above, however, states that the termination of an employee with notice has to be not less than one calendar month on either side. The proviso thereof further states that pay in lieu of notice may be ordered by a competent authority in any specific case. Thus, the Petitioner was entitled to either one calendar month notice or one month's pay in lieu thereof. Under the provisions of Regulation 9(b) termination of service of the Petitioner could not be with retrospective effect from 25.1.1991. The service of the Petitioner will therefore be treated as terminated with effect from 2.12.1991 and the Petitioner will be entitled to one month's pay in lieu of notice in addition to any Ors. dues payable to him further the relevant Regulations or Rules.

11. With the aforesaid observations, this writ petition stands dismissed. Considering however the entire facts and circumstances of the case, I make no order as to costs.