

(1966) 09 OHC CK 0011
In the Orissa High Court
Case No : First Appeal No. 39 of 1963

Narendranath Mohanty

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 15-09-1966

Acts Referred:

Constitution of India, 1950 — Article 311(2)
Limitation Act, 1908 — Article 102

Citation : AIR 1967 Ori 171 : (1967) 2 LLJ 414

Hon'ble Judges : R.K. Das, J;G.K. Misra, J

Bench : Division Bench

Advocate : S.C. Ghosh, D.C. Mohapatra and Ranjit Mohanty, for the Appellant;
B.K. Pal and B. Pal, for the Respondent

Final Decision : Allowed

Judgement

Misra, J.—The plaint and the written statement bristle with numerous facts. It is unnecessary to recount them, in view of the accepted position on the basis of which the litigation can be disposed of. The common case of the parties is as follows :--

2. Plaintiff was a permanent Government Servant under the defendant. On 20th of November, 1957, the defendant passed the following order (hereinafter to be referred to as the impugned order.)

"It is hereby declared that as Sri N.N. Mohanty absented himself from duty continuously for more than five years, i. e from 8-3-1951 under Rule 2014 of the Indian Railway Establishment Code, he ceases to be a Railway servant in Government employ with effect from 8-3-1956.

This is without prejudice to the Railways right to terminate the service of Sri N.N. Mohanty under the agreement".

This order was passed without any proceedings being drawn against the plaintiff in conformity with the provisions of Article 311(2) of the Constitution of India.

The suit was for declaration that the impugned order is illegal and ultra vires and for recovery of arrears of pay from 2-6-51 to 31-10-58 to the tune of Rs. 13,599/-.

3. The defence case is. that the plaintiff absented himself continuously for more than five years, and under the aforesaid rule, he automatically ceased to be Government Servant. There was a further averment that the claim for dearness allowance was not maintainable as the plaintiff was not in actual service and the claim for arrears of salary beyond three years from 28-1-59. the date of suit, is barred by limitation.

4. The learned Additional Subordinate Judge dismissed the suit. The plaintiff has filed this appeal.

5. Rule 2014 of the Indian Railway Establishment Code (F. R. 18) is as follows :

"2014 (F. R. 18)--Continuous absence from duty. Unless the President, in view of the special circumstances of the case, shall otherwise determine, after five years" continuous absence from duty, elsewhere than on foreign service in India, whether with or without leave, a Railway Servant ceases to be in Government Employ."

On the basis of this rule, Mr. Pal contends that the defendant has merely declared by the impugned order that the plaintiff ceased to be a member of the service. Such a declaration does not amount to removal of the plaintiff from service within the meaning of Article 311, and accordingly it was not necessary to give a reasonable opportunity to the plaintiff of showing cause against the action proposed which culminated in the impugned order.

6. The contention is devoid of force. The matter is no longer res integra and is concluded by the decision Jai Shanker Vs. State of Rajasthan, . An identical argument was rejected in that case. Regulation No. 13 of the Jodhpur Service Regulations was under examination. It was to the effect:--

"13.--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".

It was contended before their Lordships that the regulation was sufficient to enable the Government to remove a person from service without giving an opportunity of showing cause against that punishment, ii any. It was held that the Constitutional protection effected by Article 311(2) of the Constitution cannot be taken away in this manner by a side wind, The argument that the provision under the Regulation for reinstatement of the Government servant with the sanction of the competent authority did not amount to removal, was negatived. Their Lordships clearly pronounced that a removal is removal and as it was a punishment for over-staying one"s leave, an opportunity must be given to the person against whom such an order was proposed irrespective of the question

how the regulation prescribes it. Not to give an opportunity of showing cause is to go against Article 311(2).

7. The Identical principle applies to this case. The declaration under Rule 2014 that a Railway servant ceases to be in Government employ if he continuously absents from duty for more than five years, in essence, amounts to removal of the Government servant. The mandatory provision of Article 311(2) cannot be dispensed with. On the admitted position that the plaintiff was given no reasonable opportunity of showing cause against the action proposed is removal from service by the impugned order and was illegal. It is hereby declared that the impugned order is null and void and the plaintiff shall be deemed to be in service.

8. Under Article 102 of the Limitation Act, for wages not expressly provided for, the limitation is three years when the wages accrue due. It is now well settled that this article applies to suits for arrears of salary of a Government servant (See *Shri Madhav Laxman Vaikunthe Vs. The State of Mysore*, .

Plaintiff is therefore, entitled to arrears of salary with effect from 31-1-56 to 31-10-58, i. e. 2 years, 9 months and 3 days. The learned Advocates for both the parties state that for this period, plaintiff is entitled to arrears of salary at the rate of Rs. 79/- per month and not to dearness allowance.

Plaintiff is therefore, entitled to a decree for Rs. 2,615/- as consented to by the parties. The residue of the claim is dismissed.

9. In the result, the judgment of the learned Additional Subordinate Judge is set aside and the plaintiff's suit is decreed in part. As the success is partial, parties to bear their own costs throughout.

10. The suit and the appeal were filed in forma pauperis. Court-fee payable in both the Courts would be borne by the parties equally. Plaintiff is entitled to pendente lite and future interest at 6 per cent per annum on the amount decreed.

11. The appeal is allowed as indicated above.