
(1984) 07 KL CK 0041
In the High Court Of Kerala

Radha

APPELLANT

Vs

Station Director, AIR

RESPONDENT

Date of Decision : 31-07-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 310, 311

Citation : (1985) 1 LLJ 385

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Judgement

U.L. Bhat, J.—This original petition has been filed under Article 226 of the Constitution of India by a Staff Artist Announcer in the All India Radio, Trivandrum to quash Ext. P 6 order issued by the first respondent, Station Director terminating her contract and to direct the respondents to reinstate her without break in service and to pay her salary and allowances due to her.

2. The facts of the case can be summarised as follows:

Petitioner was appointed as a Staff Artist Announcer in the All India Radio, Trivandrum on a monthly fee of Rs. 425/- as per memorandum dated 29th November, 1976 (Ext. P 1) on a three year contract with one year's probation likely to be extended by three months and subject to passing of departmental tests. According to Ext. P 1, she would be considered for long term contract upto the age of 58 years only on successful completion of such probationary period and passing of test. Accordingly, Ext. P 2 agreement was entered into between the petitioner and the President of India represented by the Station Director. On 29th September, 1978 under Ext. P3, petitioner's probationary period was terminated with effect from 1st August, 1978 and her contract was extended upto 4th May, 2005, the date on which she would attain the age of 58 years.

3. On 31st December, 1982, petitioner absented herself from duty. According to her, her husband had informed the Programme Executive over the phone about her inability to attend on account of the riots in Trivandrum. Ext. R1(b) memo

dated 6th January 1983 was issued to her asking her to explain her absence by 30th January, 1983. According to the petitioner, she sent a reply to Ext. R1(b) under the original of Ext. P7, though this is denied by the respondents. There is no dispute that she has a sick child suffering from rheumatic heart. She submitted application for earned leave for one month from 3rd January, 1983 mentioning the reason as "domestic affairs". On account of acute shortage of Announcers, Ext. R1(a) memo dated 4th January, 1983 was issued calling her back to duty immediately. She did not comply. The file produced before me shows that at one stage it was being considered whether her absence should be treated as dies-non and whether disciplinary action should be taken. On 20th January, 1983, Ext. R1(c) memo was issued alleging that she had not replied to the two earlier memos, that the matter was being viewed seriously and the contract was liable to be terminated unless she reported immediately. She sent a reply pointing out that her second child was ill with rheumatic heart and if leave could not sanctioned she may be compelled to resign and also pointing out that she had duly sent replies to the two earlier memos and if they had not been received, she would send copies of those letters. As per memo dated 17th February, 1983, leave was regularised and she was granted 17 days" earned leave two days" half-pay leave and 11 days" Extra-ordinary Leave (E.O.L.) till 1st February, 1983.

4. Meanwhile, on 30th January, 1983 she submitted an application for extension of leave for sixty days from 2nd February, 1983 to 2nd April, 1983 stating that leave was necessary to enable her to attend on her sick child. As per memo dated 17th February, 1983, E.O.L. without medical certificate for sixty days till 2nd April, 1983 was sanctioned for her; however, she was asked to produce medical certificate while rejoining duty. On 31st March, 1983, petitioner submitted another application for extension of leave for ninety days from 3rd April, 1983 to 1st July, 1983 to enable her to attend on her child. As per memo dated 11th April, 1983, E.O.L. was sanctioned for 19 days till 21st April, 1983 on the ground that according to Rule 32 of the Central Civil Services Leave Rules (for short "the Leave Rules") on any one occasion she was not eligible for E.O.L. without medical certificate for more than ninety days and she had already availed of E.O.L. for 71 days (11 plus 60). By this memo, she was also informed that if she failed to join duty on 22nd April, 1983, the contract may be terminated. According to the petitioner, she sent a letter on 12th April, 1983, pleading her inability to join duty on 22nd April, 1983 and seeking of leave applied for. Ext. P8 is said to be the postal acknowledgement. Respondents would deny the receipt of this letter. She did not join duty on or after 22nd April, 1983.

5. The file produced before me would show that on her failure to join duty on 22nd April, 1983, the officers concerned were considering as to what steps should be taken. They decided to take further action as per the Manual and the Rules and to seek directions from the Director General. As intimated by the Director General's memo dated 4th June, 1983, it was decided to terminate the contract, with effect from 22nd April, 1983 for absence without intimation

beyond the limit of 90 days. Accordingly, Ext. P6 memo dated 17th June, 1983 was issued to her stating that her contract is terminated with effect from 22nd April, 1983, since she did not report for duty after the expiry of E.O.L. sanctioned without medical certificate for 90 days at a stretch and in view of her overstay beyond the permitted limit of 90 days E.O.L. in spite of notice given to her as per memo dated 11th April, 1983. It is this termination which is now challenged.

6. Petitioner claims protection of Article 311(2) of the Constitution and the Leave Rules. According to her, termination in this case is really a punishment imposed without an enquiry and without giving an opportunity to show cause and imposed in violation of principles of natural justice and violative of Articles 14 and 16 of the Constitution and arbitrary. She also contended that her claim is eligible under Rule 32 of the Leave Rules. According to her, if at all action ought to have been taken against her under the Central Civil Services (Conduct) Rules or the Classification, Control and Appeal Rules. It is also contended that under Rule 25 of the Leave Rules, action could be taken only for wilful absence after the expiry of leave. Ext. P6 is contrary to the agreement also. Her termination is void.

7. These contentions are abutted by the respondents. According to them, proper opportunity for showing cause was given to the petitioner by serving two earlier memos. The protection of Article 311(2) of the Constitution or the Rules has not been denied to her. The Conduct Rules or the Classification, Control and Appeal Rules do not apply to Staff Artists. Only leave Rules are followed in their case. Principles of natural justice have not been violated and safeguards guaranteed to a civil servant have not been overruled. She has to be treated as a temporary Government servant (that is not permanent or quasi-permanent) and therefore, she was eligible for E.O.L. without medical certificate only 90 days and that had been sanctioned. She never applied for E.O.L. on medical certificate. It was unnecessary to take disciplinary action and respondents had the right to terminate her contract. The termination was not effected by virtue of Clause (4) of the agreement and the termination did not violate the agreement.

8. On the pleadings, there could be no doubt that the petitioner is a civil servant entitled to protection of Article 311(2) of the Constitution of India. In the original petition it is clearly stated that the termination of her services is opposed to Article 311(2) of the Constitution and there has been total disregard of the constitutional safeguards available to a civil servant in the matter of dismissal of the petitioner from service. This plea has not been rebutted in the counter-affidavit, except to say that there has been no violation of Article 311(2) of the Constitution. The Court is therefore entitled to proceed on the basis that the petitioner is a civil servant entitled to such protection.

9. However, learned Central Government Standing Counsel, Sri P.V. Madhavan Nambiar, vehemently contended that the petitioner was not a civil servant as she was working in the All India Radio as a Staff Artist only on the basis of a contract. Articles 310 and 311 of the Constitution refer inter alia, to civil post. The connotation of the expression "civil post" has been considered by the

Supreme Court in a number of decisions. (See *State of Uttar Pradesh and Another Vs. Audh Narain Singh and Another*, , *State of Assam v. Kanak Chandra* 1968-I L.L.J. 288, *The Superintendent of Post Offices and Others Vs. P.K. Rajamma*,). The expression "civil post" has been used only in contradistinction to the post in the defence wing. It means an employment in a civil capacity under the Union or a State. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State. There must be a relationship of master and servant between the State and the person claiming to be holding a post under it. Generally speaking, the existence of such relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration, the existence of the liability of the person to work under the administrative control of the offices of the State. Coexistence of all these indicia is not necessary in every case to make the relationship one of master and servant. In several cases of employment, a contract of service may exist even in the absence of one or more of these indicia.

10. We have to examine the facts of the case to decide whether petitioner was holding a civil post. Ext. P1 is the original memorandum issued to the petitioner with reference to her application for the post of "Staff Artist Announcer". The engagement was offered to her on a monthly fee together with other allowances admissible to casual articles under the rules. The memorandum was issued pending completion of necessary formalities, after the completion of which she would be engaged as Staff Artist Announcer, in the fee scale mentioned therein on a three year contract with one year's probation likely to be extended by three months and subject to passing departmental test. Ext. P1 also stated that she would be considered for long term contract upto the age of 58 years only on successful completion of such probationary period and passing of test. The job requirements included writing announcements and broadcasting them, writing presentation scripts and special programmes for special audience, to play-back the recordings of music and other programmes, selection of records, helping the production and comparing programmes of all kinds, replying to listeners' letters, filling in the fault reports, log books etc., maintenance of registers and index relating to special programmes activity, taking part in programmes as and when required, reading scripts, commentaries, short stories etc. and to attend to other duties which may be assigned from time to time. Under Ext. P1, she was declared to be governed by the Rules applicable to Staff Artists prescribed by the Government from time to time and to take the oath of allegiance, to submit a marriage declaration. In pursuance of Ext. P1, an agreement was entered into as seen in Ext. P2. Under the agreement, she was required to submit herself to the orders of the Government and all the Officers and authorities under whom she may be placed by the Government and to render the services required of her for the three year term. She was required to devote her whole time to the services required of her and at all times to obey the rules including the Conduct Rules

prescribed for her. She would be required without any extra fee to render such services other than the services assigned to her under the terms of the contract. Clause 4 prescribed under what circumstances the agreement could be terminated. It could be terminated by the Government or Officers without notice during or at the end of the period of probation, at any time by one calendar month's notice if in the opinion of the Government she proved unsuitable for efficient performance of her services and without previous notice if the Government were satisfied on medical evidence that she is unfit etc, or if she be guilty of insubordination, intemperance or other misconduct or breach of non-performance of any of the provisions of the agreement or the Conduct Rules with liability for suspension during period of investigation. The contract was declared to be terminable by six calendar months' notice in writing by either side. Ext. P2 also stated that she would be eligible for leave and leave fee in accordance with the relevant rules. Other privileges relating to medical attendance and treatment, travelling allowance, participation in Contributory P.P. Scheme, gratuity etc. have been provided for. She could not accept outside engagements without previous permission. Clause 13 stated that in respect of any matter in respect of which no provision has been made in the agreement, the provision of the Conduct Rules and terms and conditions of the engagement as amended from time to time shall apply to her. Under Ext. P3 successful completion of her probation was declared and the contract was extended upto the date on which she would attain the age of 58 years.

11. From what is stated above, it is clear that she was selected and appointed as Staff Artist by the officers of the Government, that the Government and the authorised officers have the right to suspend and terminate her services, that they have right to control the manner and method of her doing the work and she is to be paid remuneration by the Government. She was subject to disciplinary control of her superiors who are Government servants. In these circumstances, it is clear that there was master and servant relationship between the State and the petitioner. It could be said that she was holding a civil post and entitled to protection under Article 311(2) of the Constitution of India. I notice that under similar circumstances, a similar view has been taken by the Allahabad High Court in *M.A. Chowdhary v. Union of India* 1975(1) S.I.R. 457 and by the Andhra Pradesh High Court in *Ilyas Ahamad v. Station Director* 1979(2) S.I.R. 651. There is also no doubt that even where a person holds a post under a contract, depending on the facts and circumstances of the case, he could be treated as a person holding a civil post. (See *Satish Chandra Anand Vs. The Union of India (UOI)*, , *N.S. Nagaraja Rao v. State of Mysore* 1958 I L.L.J. 319, *Rebecca Chanapillay v. State of Kerala* 1963 I LL.J. 362.

12. The question which next arises for consideration is whether the termination of petitioner's services was in violation of the protection guaranteed under Article 311(2) of the Constitution. The right involved in this case is the right to have an enquiry in which she has been informed of the charges against her and given a reasonable opportunity of being heard in respect of those charges. I have

already indicated that Clause 4 of Ext.P2 agreement confers on the State a right to terminate her services with or without notice in the circumstances indicated therein. Petitioner would allege that the impugned termination was not under Clause 4 of Ext. P2 and this is admitted in the counter affidavit. It is therefore, clear that the termination was not under the terms of the agreement. At page 3 of the counter affidavit, it is stated that her service was not wilfully terminated but termination of her service occurred due to the efflux of time, This statement conveys no meaning at all. Her service would become terminated by efflux of time only when she completes the age of 58 years. In paragraph 6 of the counter affidavit, it is stated:

The authorities have only followed the leave Rules and the contract of employment became terminated due to the active violation committed by the petitioner of the provisions of Central Civil Services (Leave Rules), 1972.

At the same time, in paragraph 9 of the counter affidavit, it is stated that the CCS (CCA) Rules are not applicable to Staff Artists of All India Radio. In paragraph 11 of the counter affidavit, it is stated that Rule 25 of the Leave Rules did not come into the picture as the competent authority was not empowered to extend the leave in view of the limitation contained in Rule 32(2)(a) of the Leave Rules Paragraph 12 of the counter affidavit states that Clause 4 of the agreement is not applicable as this is not a case of termination of the agreement under that clause. In paragraph 11, it is also stated that when the petitioner was informed that unless she reported for duty by a certain date, her contract would be terminated and she remained absent even after the expiry of that day, it could only be construed as wilful absence. Relevant portion of para 5 4 30 of All India Radio Manual Vol. I parts I and II is produced and marked as Ext.RIE Clause (iii) states that if a Staff Artist who has proceeded on leave with permission fails on the expiry of his leave to resume his duties and does not obtain prior sanction for extension of leave to the maximum extent permissible under the rules on reasonable grounds and fails to resume duty after the expiry of that period, his contract should be considered as terminated on the expiry of three months" period from the date he proceeded on leave and any fee due to him should be credited to Government. It is evidently acting under this clause that the contract of the petitioner was terminated under the impugned memo.

13. Admittedly, petitioner did not attend duty on 31st December 1982. That was the day on which Trivandrum city was rocked with riots It is asserted by the petitioner that her residence is situated in the area affected by the riots and that her husband informed an officer in the All India Radio about the difficulty and requested for the staff car to be sent to enable her to attend the office. These averments are made in the reply affidavit and are not denied. Ext. RIB memo was issued to her asking her to explain her absence. It is alleged in the counter affidavit that petitioner did not send reply though petitioner would have it, that she sent a reply under the original of Ext. P7. She submitted an application for earned leave for one month from 3rd January, 1983 on account of "domestic

affairs". Admittedly, she has a sick child suffering from rheumatic heart, On account of acute shortage of Announcers, Ext. R1(a) memo was issued calling her back to duty immediately and she did not comply with it. The file shows that it was under consideration whether disciplinary action should be taken. Ext. R1(c) memo was issued referring to the two earlier memos and warning her that the matter was viewed seriously and the contract was liable to be terminated unless she reported immediately. She sent a reply. Leave applied for was regularised till 1st February, 1983. She sought for extension of leave for 60 days till 2nd April, 1983 to enable her to attend on her sick child The same was granted. She sought further extension of leave for 90 days from 3rd April, 1983 to 1st July, 1983. On the ground that she was eligible for 19 days leave, that alone was granted. That would expire on 21st April, 1983. Under the memo issued in that connection she was informed that if she failed to join duty on 22nd April, 1983, the contract may be terminated.

Petitioner would contend that she sent a letter pleading her inability to join duty and seeking sanction of leave applied for though the receipt of such a letter is denied.

14. A controversy has been raised at the Bar as to her entitlement to extraordinary leave under the Leave Rules. I do not think I need go into this controversy. Let me proceed on the assumption that she was not eligible for leave of any sort beyond 21st April, 1983 and she overstayed the leave without permission. Under the provisions of AIR Manual (Ext.RIE) in such cases, the contract should be considered as terminated as mentioned therein. Admittedly, the Leave Rules have been made applicable to Staff Artists. In fact, extraordinary leave was sanctioned to the petitioner for 90 days only under Rule 32 of the Leave Rules. Rule 25 of the Leave Rules deals with absence after expiry of leave. Unless the authority competent to grant leave extends the leave, a Government servant (which should include a Staff Artist as we have already seen as admittedly the rules have been made applicable to Staff Artists) who remains absent after the end of leave is entitled to no leave salary for the period of such absence. Sub-rule (2) of Rule 25 states that wilful absence from duty after the expiry of leave renders a Government servant liable to disciplinary action. Swamy's compilation of the Leave Rules at page 21 refers to a Government decision in D.G., P & T's Letter No. 6/28/70 dated 10th February, 1970. It has been clarified that the power of disciplinary authority to take appropriate disciplinary action for any misconduct and impose one of the penalties under the CCS (CCA) Rules has not been taken away and action can, therefore, be taken under these rules for unauthorised absence from duty or overstayal of leave, even for one day treating it as mis-conduct if the facts and circumstances of the case warrant such an action. At page 22 arc published certain other decisions. When a temporary Government servant asks for leave in excess of the limits prescribed under Rule 32 and the circumstances are exceptional a decision should be taken by the leave sanctioning authority to grant further leave in excess of the limits in consultation with the Ministry of Finance. Where such

leave cannot be sanctioned, Government servant should be asked to rejoin duty within a specified date failing which he would render himself for disciplinary action. It is further stated that it would be open to the disciplinary authority to institute disciplinary proceedings against him. If during the course of disciplinary proceedings, he comes for rejoining duty, he should be allowed to ; do so without prejudice to the disciplinary action.

15. Admittedly, Leave Rules have been made applicable to Staff Artists, Rule 25 clearly, contemplates disciplinary action being taken under the CCS (CCA) Rules for overstaying after the expiry of leave where it is wilful. In these circumstances, it is futile for the respondents to contend that the CCS (CCA) Rules have not been made applicable to Staff Artists. Rule 25 of the Rules specifically enables such act on to be taken against persons governed by those rules. There may have been grounds for the respondents to believe that the petitioner committed an act of mis-conduct. Such act would render her liable for disciplinary action. The provisions in the AIR Manual cannot override the statutory rules. The termination of petitioner's services in the instant case was clearly referable to her alleged mis-conduct and violation of the directions issued to her by the second respondent to rejoin duty. The termination in the instant case clearly amounted to removal from service. It is true that she was warned that if she stayed away, the contract was liable to be terminated. But charges were not framed against her, she was not informed of the charges, she was not given a reasonable opportunity of being heard in respect of the charges and there was no enquiry. There was clear violation of the Constitutional protection under Article 311(2) of the Constitution. Therefore, the termination cannot stand.

16. In *Jai Shanker v. State of Rajasthan* 1966 I L.L.J. 140 , the Supreme Court had to consider the case of removal from service of a Government servant for overstaying leave. Service regulations provided for automatic termination of service for overstay, just as the AIR Manual provides for such action in the case of Staff Artists. The regulations provide that 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 argued before the Supreme Court that under the regulations all that the Government did was not to allow the person to be reinstated and the Government did not order his removal because the incumbent himself gave up the employment. The Supreme Court rejected the argument thus at P. 143 of 1966 I L.L.J. 140:

We do not think that the constitutional protection can be taken away in this manner by a side wind. While, on the one hand, there is no compulsion on the part of the Government to retain a person in service if he is unfit and deserves dismissal or removal on the other, a person is entitled to continue in service if he wants until his service is terminated in accordance with law. One circumstance deserving removal may be overstaying one's leave. This is a fault which may

entitle Government in a suitable case to consider a man as unfit to continue in service. But even if a regulation is made, it is necessary that government should give the person an opportunity of showing cause why he should not be removed. During the hearing of this case we questioned the Advocate General what would happen if a person owing to reasons wholly beyond his control or for which he was in no way responsible or blamable, was unable to return to duty for over a month, and if later on he wished to join as soon as said reasons disappeared? Would in such a case Government remove him without any hearing, relying on the regulation? The learned Advocate General said that the question would not be one of removal but of reinstatement and Government might reinstate him. We cannot accept this as a sufficient answer. The Regulation, no doubt, speaks of reinstatement but it really comes to this that a person would not be reinstated if he is ordered 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 over-staying 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 over-staying his leave but we do not think that 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.

(Emphasis supplied)

17. I hold that the order terminating the contract of service of the petitioner was imposed as a punishment for overstaying leave and that was done without complying with the requirements of Article 311(2) and therefore the order is illegal and cannot stand. It is violative of principles of natural justice and also arbitrary. In this view, it is unnecessary for me to consider whether she was or was not eligible for more leave asked for.

In the result, the original petition is disposed of in the following manner:

1. Ext. P6 is quashed.

2. It is declared that the petitioner continues in the civil post which was being held by her under Ext.P3 notwithstanding Ext.P6. Respondents are directed to reinstate the petitioner as Staff Artist Announcer (Malayalam) in All India Radio, Trivundrum.

The question of regularisation of the period of absence and connected matters will be decided by the authority concerned. Petitioner will be forthwith admitted to duty. This judgment, of course, will not stand in the way of disciplinary proceeding being initiated against the petitioner.

In these circumstances, there will be no direction as to costs.