
(1988) 05 PAT CK 0060

In the Patna High Court

Case No : Appeal from Appellate Decree No. 396 of 1981

Ram Subhag

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 26-05-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 80(1)(b)
Constitution of India, 1950 — Article 311(2)

Citation : (1988) PLJR 821

Hon'ble Judges : S. Ali Ahmad, J; Ram Nandan Prasad, J

Bench : Division Bench

Advocate : Shivanand Pd. Sinha, Triyogi Narain Pandey and Purushottam Jha, for the Appellant; A.B. Ojha, for the Respondent

Judgement

S. Ali Ahmad, J.—The plaintiff-appellant filed a suit giving rise to this appeal for declaration that Annexures "A" and "B" to the plaint are illegal, arbitrary, unconstitutional and without jurisdiction as they were passed without complying with the principles of natural justice and, as such, are void and inoperative. A further declaration that the plaintiff continued to be in service was prayed for. The last prayer was that the defendants be permanently restrained from interfering with the discharge of the plaintiff's duty as usual. The suit was decreed by the trial court but on appeal the same has been dismissed. Thereafter this second appeal has been filed which was listed for hearing before a learned single Judge. As the points involved in the case were of significance, the appeal was directed to be placed before a Division Bench by order dated 30.11.1984. Facts relevant for the disposal of this appeal are that the plaintiff was appointed as Khalasi in the Eastern Railway sometime in the year 1957. On 19.2.1977, while he was posted at Dehri-on-sone, he received letter No. CS/174/77 dated 9.2.1977 under the signature of defendant No. 4. This letter/notice is Annexure "A" to the plaint. It states, inter alia, that on 31.1.1977 the plaintiff turned up at about 8 hours and started forcing I.O.W. to mark him present on 29.1.1977 although he had turned up late by 1½ hours on that day. It was further stated in

the notice that the plaintiff even assaulted Shri M.S. Guha, Works Mistri and Munshi Sharma, Carpenter. According to the notice, in the circumstance, it was not desirable to retain the plaintiff in service and it was not reasonably practicable to hold enquiry in the manner as provided in the Railway Servants (Discipline and Control) Rules, 1968 (hereinafter to be referred to as "the Rules") and, therefore, in exercise of powers conferred by rule 14(ii) of the said Rules, defendant No. 4, namely, Divisional Superintendent, Eastern Railway removed him from service with effect from 12.2.1977. The plaintiff says that the allegations made against him in the notice (Annexure A to the plaint) were incorrect and false. According to him, facts were entirely different which he narrated in the plaint. But for the purpose of this appeal, it is not necessary to mention them. Against the order removing the plaintiff from service, he filed an appeal before the Chief Engineer, defendant No. 3, but the appeal was also illegally dismissed by the order which has been marked as Annexure "B" to the plaint. It is said that the plaintiff filed an appeal before the General Manager, Eastern Railway (defendant No. 2) but the same has not been disposed of and the plaintiff was not expecting any relief from him. In the circumstance, a notice u/s 80 of the CPC was served upon the defendants but that also did not yield any result and, as such, the suit giving rise to this appeal was filed.

2. The defence, inter alia, was non-compliance of the mandatory provision of section 80 of the Code of Civil Procedure. The order removing the plaintiff from service was also sought to be justified on facts and the facts mentioned in the notice were reiterated. It was also said that past record of the plaintiff indicated that he was a notorious man by nature and it was not possible to hold enquiry as the plaintiff had terrified all the witnesses. Under the circumstance, it was said that the plaintiff was removed under rule 14(ii) of the Rules.

3. Admittedly notice u/s 80 of the CPC (for short "the Code") was served upon all the defendants, excepting defendant No. 3, the Chief Engineer. On that basis it was argued before the trial court that the suit was bad for non-compliance of notice u/s 80 of the Code. The trial court was of the view that no separate notice to the Chief Engineer (defendant No. 3) had to be served as the notice had already been served on the General Manager of the Railway and the Chief Engineer was an officer of the Railway. It was, therefore, of the view that the suit could not fail for want of notice u/s 80 of the Code to the Chief Engineer, defendant No. 3. It also held that the order removing the plaintiff from service was passed without giving notice to him which violated the principle of natural justice. It was also of the view that rule 14(ii) of the Rules was misused by the defendants. It, therefore, decreed the suit as prayed for. The lower appellate court on the basis of the decision in the case of Ramchandra Sharma and Others Vs. Union of India(UOI) and Others, and in the case of Dinesh Prasad Sah and Ramundit Mandal Vs. Divisional Suprintendent and Others, was of the view that even in cases where rule 14(ii) of the Rules was brought in service an opportunity of being heard before passing final order of dismissal or removal had to be given. The lower appellate court has observed that in view of this position,

the defendants, who were appellants before it conceded that the order of removal was passed in contravention of rule 14(ii) of the Rules, but the lower appellate court was of the view that a separate notice u/s 80 of the Code had to be served on defendant No. 3, the Chief Engineer, who, in appeal affirmed the order of removal. Since that was not done the court of appeal below allowed the appeal and dismissed the suit for non-compliance of section 80 of the Code.

4. Learned counsel for the appellant strongly contended that no separate notice had to be served on defendant No. 3, the Chief Engineer as he was only the appellate authority, who affirmed the order of removal. He urged that no relief was prayed for against defendant No. 3 and that he was not a necessary party at all to the suit. In order to appreciate this argument, section 80 of the Code has to be kept in mind. It provides that no suit shall be instituted against the Government or against a public officer in respect of any action purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at the office. This section also provides that in case of a suit against the Central Government where it relates to a railway, the notice has to be delivered to the General Manager of that railway. Learned counsel urged that the suit was filed against the Central Government as it was the owner of the Eastern Railway. He says that undisputedly notice was served on the General Manager of that railway. He, therefore, says that the mandatory provisions of section 80(1)(b) of the Code has been complied with. He further urged that so far as the Chief Engineer is concerned, he was not sued in his official capacity as Chief Engineer but was made a party as he disposed of the appeal. It is difficult to accept this argument of learned counsel. The Chief Engineer was the appellate authority under the Rules and he heard the appeal by virtue of being the Chief Engineer. Therefore, his capacity to hear the appeal was certainly official. Section 80 of the Code is very clear that no suit shall be instituted against the public officer if he is sued in his official capacity until expiration of two months next after notice in writing has been delivered. The court of appeal below; therefore, in my opinion was absolutely right in holding that the Chief Engineer was sued not in his personal or individual capacity but in his official capacity. Since no notice u/s 80 of the Code was admittedly given, the suit was bad on that account. This, however, does not conclude the controversy between the parties, Learned counsel for the appellant contended that no relief was prayed for against the Chief Engineer and, as such, no notice u/s 80 of the Code was necessary. This argument cannot be sustained in view of the decision in the case of Secy. of State Vs. Amarnath and Others, . In this case, the suit was dismissed for non-service of notice u/s 80 of the Code on the Secretary of the State although no relief was sought for against him. The Bench in that connection observed "One cannot read into section an interpretation that in a suit against the Secretary of State notice is not required where no relief is sought, as against him; it is impossible to insert these words in the section or to read the section as if these words found a place in it." Same is the position here. Although no relief has been prayed for against the Chief

Engineer but since he has been made a party, therefore, the suit will fail if there has been non-compliance of section 80 of the Code.

5. There is another aspect of the matter also. The suit was filed against the Central Government and since it related to Eastern Railway, therefore, notice u/s 80 of the Code was given to the General Manager. The relief that the order of removal passed against the plaintiff was illegal, void and inoperative was sought for against the Central Government. The Chief Engineer, defendant No. 3, was made a party because he heard the appeal and affirmed the order of removal passed by the Divisional Superintendent (defendant No. 4). Had the order of removal been challenged in a writ proceeding the Chief Engineer was a necessary party because he was the author of Annexure "B" and no writ of certiorari could be issued quashing Annexure "B" unless its author was a party. But this is not the position in a suit. Order I, rule 3 of the Code prescribes that all persons may be joined in one suit as defendants where any right to relief in respect of or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative. Here the plaintiff had no right to any relief against the Chief Engineer. He was, therefore, not a necessary party. The question that now arises is as to whether his name may be allowed to be expunged from the category of the defendant. In the case of Baldeo Prasad and Others Vs. Sukhi Singh and Others, , Rowland, J. (as he then was) held that in a case in which the Secretary of State is merely a pro forma defendant, no relief having been claimed against him, it might be permissible to order that the name of the Secretary of State should be expunged from the action and to allow the suit to proceed against the other defendants. He, however, said that such a course cannot be followed where such an amendment of pleadings is not possible without material change in the nature of the suit, the cause of action and the relief sought. In such a situation it was held that the proper course is to reject the plaint as barred by section 80 of the Code. I asked learned counsel for the defendant-respondents, if on the facts of this case, the name of the Chief Engineer (defendant No. 3) can be directed to be expunged from action. Although Mr. Ojha opposed this but he did not say that this cannot be done without material change in the nature of the suit, the cause of action and the relief sought. I have perused the plaint and I do not find that in case the name of defendant No. 3 is expunged from the category of the defendant then there will either be change in the nature of the suit or the cause of action or the relief sought. I, therefore, directed that the name of the Chief Engineer, defendant No. 3, be expunged from this action. Once it is so done the suit is in order and it cannot be said to be defective for non-service of notice u/s 80 of the Code.

6. Mr. Ojha argued that the view taken by the court below that even where rule 14(ii) of the Rules was brought into service an opportunity of being heard had to be given before passing final order of dismissal or removal is wrong. This view, learned counsel says, was based on two decisions of this Court reported in Dinesh Prasad Sah and Ramundit Mandal Vs. Divisional Superintendent and

Others, These two decisions in terms were based on the decision in the case of The Divisional Personnel Officer, Southern Railway and Another Vs. T.R. Chellappan and Others, . But this case itself has subsequently been overruled by the Supreme Court in the case of Union of India and Another Vs. Tulsiram Patel and Others, . Learned counsel, therefore, says that no notice was required to be given to the plaintiff for the purpose of passing an order of removal. Learned counsel seems to be correct here. The Supreme Court in the aforesaid case has held that an opportunity of hearing is wholly ruled out under the second proviso to Article 311(2) of the Constitution of India. The learned Judges in that connection also observed that this position may appear to be harsh but that is the amendment made in the Constitution as a matter of public policy and in public interest for public good. The position, therefore, is that the view taken by the court of appeal below that the order is bad for not giving an opportunity to the plaintiff of being heard is erroneous and is set aside. But that does not really help the respondent. The second proviso to Article 311(2) of the Constitution as said by the Supreme Court is "harsh" and takes away very important right of the employees. The requirement, therefore, of this proviso must be strictly complied with. This proviso, inter alia, says that where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry, then the order may be passed either dismissing or removing the concerned employee without affording him an opportunity of being heard. Clause (b) to the second proviso says that the authority empowered to dismiss or remove person must be satisfied for reasons to be recorded by that authority in writing that it was not reasonably practicable to hold such inquiry. This is the condition precedent to exercise of this power. It gives some protection or relief to the employees. Admittedly no reason has been recorded by the authority in writing as to why it was not reasonably practicable to hold such inquiry. All that has been said in the order removing the plaintiff from service is that it was not reasonably practicable to hold an inquiry but no reason in support of his conclusion has been given. That does not meet the requirement of this proviso. I am, therefore, of the view that the order removing the plaintiff-appellant from service as contained in Annexure "A" and confirmed by Annexure "B" is bad on account of non-compliance of the condition precedent for exercise of powers under the second proviso to Article 311(2) of the Constitution of India. For the above reasons, the judgment under appeal is set aside and the appeal is allowed. The suit is decreed but the parties will bear their own costs through out.

Ram Nandan Prasad, J.

I agree.