

(2005) 01 CAL CK 0030
In the Calcutta High Court

Case No : C.W.J.W.P. No. 14384 (W) of 1999 and 17944 (W) of 1997

Shikha Rani Singha and Another

APPELLANT

Vs

General Manager, Calcutta Tramways Co. (1978) Ltd. and
Others

RESPONDENT

Date of Decision : 31-01-2005

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 311

Citation : (2005) 106 FLR 761 : (2005) 3 LLJ 412

Hon'ble Judges : Ashim Kumar Banerjee, J

Bench : Single Bench

Advocate : Puspendu Bikas Sahu, Partha Dutta, S. Biswas Sudipta Ray and Kallol Bose, for the Appellant; Milan Chandra Bhattacharjee, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Can an employee of Calcutta Tramways Company (1978) Ltd. (hereinafter referred to as "CTC") be removed from service on the ground of unauthorized absence without proceeding against him departmentally in a regular disciplinary proceeding?

2. The above question has come up before me in the instant case in both writ petitions. Hence, I wish to dispose of both the writ petitions by this common judgment.

3. One Mr. Bipin Behari Singha (W.P. No. 18384 (W) of 1999) and one Mr. Monon Kumar Chakraborty (W.P. No. 1794410 (W) of 1997) were employees of CTC, a wholly State owned undertaking.

4. Bipin joined the CTC in September, 1977 at the age of 21 years. After his completion of training as a conductor he was appointed as a conductor by CTC on March 23, 1984. Until 1992 he was serving CTC without any interruption. However, at the age of 36 years he became ill and he frequently used to take leave on the ground of ailment. In 1994 Bipin took leave from CTC. The company granted sick leave from December 9, 1994 to December 16, 1994. However, he

did not recover from such illness. In the meantime while he was on leave he was discharged from service w. e. f. December 10, 1994. Bipin made written representation. The authority allowed the representation and allowed him to join service again. After working for one and half years he again fell ill and took leave from April 11, 1996 to April 25, 1996 as he did not recover from his illness on his application for further extension 33 days leave was granted to him. After his recovery he went to join and he was not allowed to join as according to CTC his service stood terminated by the letter of termination dated May 16, 1996 and he was discharged from service w.e.f. April 26, 1996 on the ground of unauthorized absence. Bipin submitted all medical reports and made; representation. The same was not acceded to.

5. He ultimately expired on August 23, 1997 at Raigunj District Hospital, nearer to his native place. Because of his untimely death at the age of 41 years his family was put to immense difficulty because of financial crunch as he was the only able earning member of the family. His wife applied for withdrawal of letter of termination and compassionate. appointment. After series of representations his wife and son approached this Court by way of above writ petition inter alia praying for cancellation of the letter of termination and for payment of all post death benefit as also for compassionate appointment to his son.

6. Monon Kumar Chakraborty was also a conductor under CTC. He joined on February 5, 1985. After his training he was also allowed to work as driver as and when required. On June 13, 1997 Monon became ill and suffered eye trouble. He got himself admitted on SSKM Hospital on June 17, 1977. He was, however, released on the next day advising rest and medication. On June 21, 1997 he made a representation before the CTC medical officer with all his medical reports. On July 14, 1997 he was declared fit by the doctor who was treating him at SSKM Hospital and Monon immediately went to join. He also requested for allotment of lighter duty as advised by the doctor. Monon was, however, not allowed to join despite his contemporaneous representation made from time to time. Ultimately, the, authorities informed Monon that he was discharged from service for unauthorized absence: No such letter of termination was received by Monon. However, he received the letter of rejection of his representation for joining service on August 11, 1997. Needless to say there was no proceeding drawn as against Monon for his discharge from service. The order of termination was also not served upon him, according to him. Hence, he approached this Court. After much persuasion Monon could obtain the copy of the impugned order of termination dated July 7, 1997 which was assailed in the present writ petition.

7. The CTC opposed both the applications by filing affidavits. The principal contention of CTC was that in terms of the service regulation they were entitled to discharge any employee for his unauthorized absence without taking recourse to regular disciplinary proceeding. The relevant rules relied upon by the CTC in this regard are quoted below:

(a) Re-engagement shall not be allowed for an employee after 2 cases of discharge/retirement be it on Medical ground or unauthorized long absence or both.

(b) If an employee is absent for a period of fifteen days or more without any authority or without any application for any leave during such period he will be discharged for unauthorised long absence.

(c) If an employee is absent on PL/ML/Combination of both for a period of more than ninety continuous days he shall be retired on medical ground.

8. Mr. Puspendu Bikas Sahu, learned Counsel appearing for Bipin and Mr. Kallol Bose, learned Counsel appearing for Monon strenuously contended before me that an organization within the meaning of Article 12 was not entitled to remove an employee from service without a proper disciplinary proceeding being held. Both of them on facts demonstrated that reason for absence was made known to the authority contemporaneously and the situation was beyond the control of both of them being Bipin and Monon who were prevented by sufficient cause in joining duties regularly.

9. Mr. Milan Chandra Bhattacharjee, learned Counsel appearing for CTC contended before me that under the conditions of service an employee who remain absent without any proper leave being obtained from the authority, the authority was entitled to discharge him from service without having any regular disciplinary proceeding: Mr. Bhattacharjee however, contended that the authority in such circumstances also upon being satisfied could recall the order of discharge as was done in the case of Bipin once.

10. Mr. Bhattacharjee also contended that since the petitioners were aggrieved by the order of termination they should have approached the appropriate forum by raising an industrial dispute and this Court should not entertain the writ petition as the writ petitioners did not exhaust their remedy.

11. Parties cited the following decisions:

(i) Jai Shanker Vs. State of Rajasthan, .

(ii) Uptron India Limited Vs. Shammi Bhan and Another, .

(in) Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others,

(iv) Hindustan Fertilizer Corporation Ltd. and Ors. v. Subhas Chandra Mukherjee 1 (1992) C.L.T. 391.

(v) D.K. Yadav Vs. J.M.A. Industries Ltd.,

(vi) 1995, S.L.R. (1) 15

(vii) Hindustan Paper Corporation Vs. Purnendu Chakrobarty and Others,

(viii) Scooters India and Others Vs. Vijai E.V. Eldred,

(ix) General Manager, Magma Area, Eastern Coal Fields Ltd. Vs. Gopal Chandra Mondal and Others,

12. To resolve the controversy may I discuss the law on the subject as decided in the above precedents.

13. Jai Shanker v. State of Rajasthan (supra). Before the Apex Court a similar situation arose whereunder the Jodhpur Service Regulation an employee absenting himself without permission for one month or longer period would be considered to have sacrificed his appointment unless he was reinstated in service with the sanction of the competent authority. The Apex Court found that such a regulation was violative of Article 311 of the Constitution. The 5 Judges' Bench decision being relevant herein is quoted below Jai Shanker Vs. State of Rajasthan,

It is admitted on behalf of the State, Government that discharge from service of an incumbent by way of punishment amounts to removal from service. It is however, contended that under the Regulations all that Government does, is not to allow the person to be reinstated. Government does not order his removal because the incumbent himself gives up the employment. We do not think that the constitutional protection can be taken away -in this manner by a side 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 hand a person is entitled to continue in service if he wants until his service is terminated in accordance with law. Once 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 the 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 the said reason 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 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 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 out-side 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.

14. *Uptron India Ltd. v. Shammi Bhan (supra)*. In paragraph 20 of this decision two Judges Bench of the Apex Court observed that for overstaying the leave no person could be removed without giving an opportunity for hearing to him. The Apex Court observed that the principles of natural justice, which have to be read into offending clause, must be complied with and the employee must be informed of the grounds for which action was proposed to be taken against him for overstaying the leave.

15. *Delhi Transport Corporation v. DTC Mazdoor Congress and Ors. (supra)*. While considering particular power for termination of, service of an employee without any notice or pay in lieu of notice in a Government undertaking five Judges Bench held that such regulation and occasion for use of such power must not be violative of principles of natural justice.

16. *Hindustan Fertilizer Corporation Ltd. and Ors. v. Subhash Chandra Mukherjee (supra)*. The Division Bench of this Court considered a case where the employee was absent for more than three years. In the instant case the authority gave personal hearing to the Petitioner and disposal of his representation by reasoned order. The Division Bench observed that once the opportunity was given there was no violation of natural justice and Article 311 was not violated.

17. *D.K. Yadav v. JMA Industries Ltd. (supra)*. Three Judges Bench of the Apex Court while considering an identical issue observed that no opportunity was given and no enquiry was held. When he reported to duty on subsequent days and expressed his readiness to join duty he was prevented from reporting to duty. In such circumstances, the Apex Court held that the order of examination was violative of principles of natural justice. The Apex Court directed reinstatement with back wages.

18. *Hindustan Paper Corporation v. Purnendu Chakraborty and Ors. (supra)*. In the instance case, two Judges Bench of the Apex considered a case where incumbent proceeded on leave without any prior sanction and remain unauthorisedly absent for more than six months consecutively. The authority asked for explanation. The reply was made in a "half hearted way" which resulted in the impugned order of removal from service. The Apex Court

observed that High Court was not right in interfering with the impugned order.

19. Scooters India Ltd. v. Vijay E. V. Eldred (supra). In this case two Judges Bench of the Apex Court considered a case where the workman who was terminated from service on the ground of unauthorised absence accepted the said order for a long time. After 7 years of termination he approached the High Court for his reinstatement. In these peculiar facts the Apex Court observed that the facts alone were sufficient for the High Court to reject the writ petition and the High Court should not have adjudicated the industrial disputes involving termination. The Apex Court set aside the order of the High Court for reinstatement principally on the ground of delay. Hence, I do not find any scope of application of this decision in the instant case.

20. In the case of Monon he approached the High Court contemporaneously. In case of Bipin his family approached this Court within two years from the date of death of the concerned employee and that was also within three years from the date of termination of service.

21. Eastern Coal Fields Ltd. v. Gopal Chandra Mondal (supra). In this case the Division Bench of the High Court set aside order of the learned single Judge entertaining the writ petition considering the facts whether compassionate appointment was obtained by exercising fraud which was later on detected. I am unable to appreciate as to how this decision could be made applicable in the instant case.

22. On careful analysis of the law decided on the subject I find that the 5 Judges' Bench of the Apex Court still holds the field. Whatever dilutions, if any, made from time to time cannot in my view over come the hurdle of the ratio decided in the case of Jai Shankar (supra).

23. Coming back to the present case, CTC is a wholly owned state undertaking and is amenable to writ jurisdiction under Article 226 read with Article 12 of the Constitution. If we look to the facts of the case discussed above we would find that the Courts denied relief to the employees mostly on the ground of delay. In the instant case I do not find any laches on the part of the concerned employees or their family as the case may be, in approaching the authority or the Court in time. Both the employees suffered ailment at an early age. One ultimately died at the age of 41. These facts are staring on my face. How can I refuse relief to those ill fated employees and/or their family when I find that principles of natural justice were performed by CTC in breach. The period of overstay in both the cases was not much compared to the ailment suffered by them as appears in the medical documents annexed to the pleadings. It was not the case of CTC that those documents were vague or that issue of ailment was a mere excuse for the employees to overstay on leave. After 58 years of independence when our Constitution guaranteed preservation of fundamental rights of all the citizens of India as well as preservation and protection of the rights of the employees working under authority within the meaning of Article 12 of the Constitution

being a part of the judicial system being watch dog of the Constitution must rise to the occasion otherwise I would be failing in my duty. Mr. Bhattacharjee contended that in one case i. e. in the case of Bipin the authority considered his case and allowed him to rejoin once. In the said case it would appear that the order of discharge was issued on a day when the concerned employee was on authorized leave. In the other case no such occasion arose where the authority recalled the order of discharge.

24. In my view, the Apex Court decision in the case of Jai Shanker (*supra*) being the correct law on the subject still holds the field and is squarely applicable in the instant case. The standing orders and/or rules, service regulations referred to above and relied on by CTC must be read in consonance with the fundamental rights guaranteed under the Constitution? If it is silent that is to be read within it, if something is contrary such regulation is to be ignored. That is the mandate of the Constitution as I understand with little knowledge I have, on that score.

25. I cannot cast aside the socio-economic pattern of our state. When these two employees working in a lower post having little education were earning their livelihood out of such employment before taking it one has to take more caution as it would amount to not only deprivation of his livelihood but also will put the entire family depending on them in total uncertainty. The authorities working for the State should have taken more caution before issuing such letters of termination and/or discharge by exercising their power under the regulations or standing orders referred to above. I have no hesitation to hold that the authorities did not at all apply their mind in the way they should have as discussed above.

26. In the result both the writ petitions succeed. In both cases the orders of termination and/or discharge of duty are quashed and set aside.

27. In case of Bipin the authority would extend all post death benefit by treating Bipin on service on the date of his death by properly regularizing the period of unauthorized absence in accordance with service rules and would pay all such financial benefits to the petitioner No. 1 being the widow of the deceased employee. The authority would also consider the prayer for compassionate appointment of the Petitioner No. 2 in accordance with the service regulation.

28. In case of Monon the petitioner must be allowed to join his duty forthwith. The absence until the date of termination must be regularized in accordance with the service rules and all arrear benefits as on that date must be paid to the petitioner. However, keeping in view the precarious condition of the CTC and considering all aspects the writ petitioner (Monon) be allowed to join without any back wages for the period commencing from the date of termination till the date of his joining.

29. All extension of benefit, reinstatement and/or consideration of compassionate appointment as the case may be, must be completed and implemented within a period of six (6) weeks from date.

30. There would be, however, stay of operation of this judgment and order for a period of two (2) weeks from date.

31. Urgent Xerox certified copy will be given to the parties, if applied for.