

(1998) 07 DEL CK 0074
In the Delhi High Court
Case No : CW. No. 1887 of 1994

S.K. Bansal (Dr.)

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 15-07-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1998) 46 DRJ 490

Hon'ble Judges : K. Ramamoorthy, J

Bench : Single Bench

Advocate : Mr. A.K. Sikri and Mr. Piyus Sharma, for the Appellant; Mr. R.G. Srivastawa, for the Respondent

Judgement

K. Ramamoorthy, J.—The petitioner has challenged the order of termination dated the 26th of February, 1993.

2. The facts necessary to be noticed are: The petitioner was working with the second respondent from 3.4.1984 as Geophysicist. According to the petitioner, on the 6th of July, 1984 he was transferred to Delhi from Dehradun. In 1987, the petitioner was transferred again to Dehradun. While he was working in Dehradun, he developed Kidney trouble and he was referred to All-India Institute of Medical Sciences, Delhi. On the 22nd of April, 1987, he was transferred to Delhi on compassionate grounds. His wife was employed in Delhi Administration School. He wanted to continue in Delhi but he was transferred on the 7th of November, 1987 to Bombay. On the 24th of November, 1987, he requested for cancellation of his transfer. In 1988, he was transferred to Delhi. In 1990, the petitioner was transferred to the Bombay Unit of the second respondent. By letter dated the 2nd of April, 1990, he made a representation for his being retained in Delhi. His representation was not considered favourably. On the 9th of September, 1990, the elder brother of the petitioner died. His transfer was deferred up to the 31st of March, 1991. On the 11th of March, 1991, he again prayed for his being retained in Delhi.

3. On the 27th of February, 1993, his request was rejected. The petitioner requested for grant of leave for two months from the 1.4.1991 to 30.5.1991 by his application dated the 6th of April, 1991. The petitioner again applied for leave by his application dated the 15th of June, 1991 for two months" leave from 1.6.1997 to 31.7.1997. Again by application dated the 8th of August, 1991, he applied for two months" leave from 1.8.91 to 30.9.1991. Again on the 12th of October, 1991, he applied for leave, without pay, from 1.10.1998 to 30.11.1991. Again on the 7th of December, 1991, he applied for leave, without pay, from 1.12.1991 to 15.1.1992. By application dated the 7th of April, 1992, he applied for leave, without pay, from 16.1.1992 to 31.5.1992. By application dated the 28th of May, 1992, he asked for leave, without pay, from 1.6.1992 to 31.8.1992. By application dated the 26th of August, 1992, he again applied for leave, without pay, from 1.9.1992 to 31.11.1992. The second respondent did not send any reply. A telegram was issued on the 28th of April, 1992 that the leave asked for by the petitioner cannot be granted and that he was remaining unauthorisedly absent from 21.4.1991. He was also asked to report for duty, failing which disciplinary action would be taken against him. On the 16th of July, 1992, the second respondent issued the following telegram:-

"REFER OUR TELEGRAM DATED 28TH APRIL 1992(.) YOU ARE UNAUTHORISEDLY REMAINING ABSENT FROM DUTY AND NOT REPORTED FOR DUTY SO FAR(.) RESUME DUTIES FORTHWITH FAILING WHICH YOU WILL BE DEEMED TO HAVE RESIGNED YOUR POST IN ONGC AND WILL CEASE TO BE IN THE EMPLOYMENT OF THE COMMISSION UNDER REGULATION 14(5) OF ONGC LEAVE REGULATIONS 1968 WITHOUT ANY FURTHER NOTICE TO YOU(.)"

Regulation 14(5) referred to therein reads as under:-

"Where an employee fails to resume duty on the expiry of the period of extraordinary leave if the leave granted to him is the maximum that can be granted under this regulation or where an employee who is granted a lesser amount of extraordinary leave than the maximum admissible under this regulation, remains absent from duty for any period which, together with extraordinary leave so granted exceeds the limit up to which he would have been granted leave under this regulation, he shall be deemed to have resigned his appointment and shall accordingly cease to be in the employment of the Commission, unless the Commission may determine otherwise, in view of the exceptional circumstances of the case."

4. On the 21st of September, 1992, the second respondent wrote to the petitioner stating:-

"Your request for cancellation of transfer order to Bombay not agreed to by the competent authority.

You deemed to have resigned your post in ONGC under Regulation 14(5) of ONGC Leave Regulations, 1968, in view of your long absence from duty w.e.f.21.4.1991 and not reported for duty in spite of our telegrams dated

28.4.92 & 16.7.92 respectively."

5. The petitioner made a representation on the 15th of October, 1992 in which he asked for further extension of leave. By letter dated the 3rd of December, 1992, his representation was rejected. The petitioner again made representation on the 25th of January, 1993 and that was rejected on the 26th of February, 1993, wherein it was stated that the petitioner was deemed to be resigned from service w.e.f.13.8.1991 and the petitioner ceased to be in the service of the second respondent and his name was struck off from the rolls of the second respondent. Six months thereafter, on the 26th of August, 1993, the petitioner expressed his intention to resume duty on the 1st of October, 1993.

6. The petitioner sent a notice, through counsel, on the 6th of September, 1993. Reply thereto was sent by the second respondent on the 21st of October, 1993.

7. The petitioner has, no doubt, prayed for the reliefs already mentioned in the writ petition. On the 4th of July, 1994, the second and third respondents filed their replies to the writ petition. It is stated in the replies that the petitioner absented himself unauthorisedly from duty w.e.f.21.4.1991 in spite of the instructions of the second respondent. By letter dated the 21st of September, 1992, the petitioner was informed about the deemed resignation and in spite of it, he had not chosen to report for duty. In paragraph 9 of the reply, it is stated:-

"That with regard to para 9 of the petition, I do not admit that the petitioner wanted his transfer to Delhi on compassionate ground as he was required to present himself frequently at AIIMS, New Delhi for periodic check-up and treatment. The application of the petitioner dated 22.4.1987(Annexure-A-5) for his transfer to Delhi does not mention anything about his ailment. On the contrary the petitioner in his said letter of request had asked for his transfer to Delhi on the ground that his wife is a teacher in Delhi Administration School in Delhi and that he should also be posted at Delhi. The rest of the contents of para 9 regarding the office memo dated 3.7.1986 in respect of posting of officers in accordance with the Government of India policy as far as practicable are not denied. I, further submit that the said instructions and Govt. of India policy do not create a right in favor of the officer to be posted at one place where the other spouse is working. The instructions are recommendatory in nature and not mandatory; which are administrative instructions only. I further submit that the transfer and postings of Officers are done according to the administrative needs and exigencies of the respondents. The petitioner, however, wanted to remain posted at Delhi for his convenience."

8. It is further stated in paragraph 12 of the reply:-

"That contents of para 12 of the petition, as stated, are misleading and denied. I, however, do not deny that the petitioner was transferred to Bombay vide transfer order dated 15.3.90. I submit that the petitioner this time was transferred to Bombay after his stay of a period of about 2 years at Delhi. The stay of the petitioner at Delhi for about 2 years, i.e. from 21.4.88 till March 1990 when he

was transferred to Bombay and his earlier stay at Delhi for about three years from 21.7.84 till March 1987, a total period of 5 years was sufficient for the petitioner for his medical treatment at Delhi. However, I submit that the medical facilities at Bombay were also equally good as at Delhi and there was no reason for the petitioner to insist to remain at one particular station, at Delhi on the ground of medical treatment, when he had already stayed at one particular place twice for a total period of 5 years where he obtained the medical treatment and also that Bombay had better medical facilities than Delhi."

9. The petitioner did not want to move from Delhi. The petitioner was accommodated to the extent that was possible and the petitioner was bound to obey the orders of transfer. The petitioner cannot claim any right to remain in the place of his choice. When the petitioner absented himself unauthorisedly, he was asked by telegram dated the 28th of April, 1992 to report for duty and he did not respond. He also did not respond to the telegram dated the 16th of September, 1992, and did not report for duty. Therefore, action had to be taken under Regulation 14(5) of the Oil and Natural Gas Commission (Leave Regulation), 1968.

10. The petitioner wanted extraordinary leave, without pay, from 1.8.1991 to 30.11.1992 for about 15 months. The application for leave was not supported by any medical certificate. Regulation 14(5) of the Oil and Natural Gas Commission (Leave Regulations), 1968 states that leave cannot be claimed as a matter of right and full discretion was of the competent authority. Further extraordinary leave is admissible to an employee in special circumstances and such extraordinary leave, without pay, shall not exceed to three months on any one occasion and only on medical ground, which is duly certified by medical certificate, the maximum period would be six months. According to the second respondent there is no question of any enquiry being held against the petitioner and there is no violation of Article 311(2) because the petitioner is not a Government servant and he was bound by the regulations and that challenge of the provisions of Regulation 14(5) is without any subsistence.

11. The petitioner filed his rejoinder and it is not necessary to refer to the averments made therein.

12. The learned senior counsel, Mr. A.K. Sikri, for the petitioner relied upon the following judgments:-

1. Uptron India Limited Vs. Shammi Bhan and Another,
2. Jai Shanker Vs. State of Rajasthan,
3. The State of Assam and Others Vs. Akshaya Kumar Deb,
4. B.G. Saraswat Vs. Engineers India Ltd.,
5. Rahul Butalia Vs. State Bank of India,

13. The learned counsel for the second respondent Mr.R.G.Srivastawa,

distinguished the cases cited by the learned senior counsel for the petitioner and referred to the following judgments:-

1. Union of India Vs . H.N. Kirtania., (1989) 3 SCR 397

2."Bank of India Vs. Jagjit Singh Mehta", 1992 SCC (L&S) 268.

14. I have gone through the rulings cited by the learned counsel for the parties and any rule or regulation depriving the employee of the right to explain his position would not be valid and the order based on such rule or regulation would be invalid.

15. In view of the submissions made by the learned counsel for the parties on the power of the employer to dispense with the services of the employee in the light of the rule, it is become necessary to refer to the rulings on the point.

16. In Jai Shanker Vs. State of Rajasthan, , the judgment is given by a Constitution Bench of the Supreme Court of India. The appellant before the Supreme Court sought extension of leave on medical grounds. That was not granted and he was discharged from service on the ground that he did not join duty when his leave was refused. He filed a suit before the Subordinate Judge, Jodhpur for a declaration that the termination of his services was illegal and he was not given notice as required under Article 311 of the Constitution of India. The learned Subordinate Judge, Jodhpur dismissed the suit. On appeal, the learned District Judge, Jodhpur setting aside the decree of the learned Subordinate Judge held that the appellant before the Supreme Court was entitled to a declaration that his removal from service was illegal and that he continued to remain in employment and he was entitled to all the consequential benefits. The matter was taken up, in second appeal, to the High Court of Rajasthan which set aside the judgment of the learned District Judge restoring the judgment of the learned Subordinate Judge. Jai Shanker took up the matter to the Supreme Court.

17. Regulation 13 in that case was relied on by the State. That regulation is in the following terms:-

"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.

Note: The submission of an application for extension of leave already granted does not entitle an individual to absent himself without permission."

18. The Supreme Court held:-

"It is contended that this Regulation operated automatically and no question of removal from service could arise because Jai Shanker must be considered to have sacrificed his appointment. Under the Regulation he could only be reinstated with the sanction of the competent authority. We have, Therefore, to

determine whether this Regulation is sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any.

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 Regulation 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 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 over-staying 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 blameable, was unable to return to duty for over a month, and if later on he wished to join as soon as the 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 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 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 Art. 311. A removal is removal and if it is punishment for over-staying 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 Art. 311 and this is what has happened here.

In our judgment, Jai Shanker was entitled to an opportunity to show cause against the proposed removal from service on his overstaying his leave and as no such opportunity was given to him his removal from service was illegal. He is entitled to this declaration. The order of the High Court must Therefore be set aside and that of the District Judge, Jodhpur restored."

19. In *The State of Assam and Others Vs. Akshaya Kumar Deb*, two of their Lordships of Supreme Court, where the Government servant was removed from service under FR 18 of Assam Fundamental and Subsidiary Rules on account of his continuous absence from duty for more than five years and no opportunity was given to him to show cause why the Rule was inapplicable, held that the termination was illegal. The material part of FR 18 would read as under:-

"Unless the Provincial Government, 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 Government servant ceases to be in government employ."

The Supreme Court observed:-

From a reading of FR 18, it is discernible that it regards continuous absence of an employee, whether with or without leave, for a period of five years or more, as conduct which must normally entail "cessation" or termination of his service. Although not in so many words, but by necessary intendment, the Rule regards such conduct of the employee, as a fault or blameworthy behavior which renders him unfit to be continued in service. In this context, the "cessation" of service pursuant to this Rule would, in substance and effect, stand on the same footing as 'his removal' from service within the contemplation of Article 311(2) of the Constitution, particularly when it is against the will of the employee who is willing to serve, or who had never lost the animus to rejoin duty on the expiry of his leave. Another reason for equating 'cessation' of service under this Rule with 'removal' within the meaning of Article 311(2), is that it proceeds on a ground personal to the employee involving an imputation which may conceivably be explained by him in the circumstances of a particular case. Cases are not unknown where the absence of a Government servant, even for prolonged periods, has been due to circumstances beyond his control. The case of the Japanese soldier who remained cut off and stranded in the jungles of a remote Pacific Island for three decades after the termination of World War II, is a recent instance of this kind."

The Supreme Court further observed:-

"It is difficult to accept the contention that the 'removal' under F.R.18 does not visit the employee with any evil consequences."

The Supreme Court further observed:-

"The Constitutional protection guaranteed by Article 311(2) cannot be taken away by assignment."

Their Lordships had followed the judgment in Jai Shanker's case (Supra).

In Shahoodul Haque Vs. The Registrar, Co-operative Societies, Bihar and Another, , three learned Judges of the Supreme Court had an occasion to decide the validity of the order of removal on similar grounds. The appellant before the Supreme Court applied for leave to go on pilgrimage to Mecca in the year 1963. He left the place of employment, even though leave was not granted. Later on he applied for extension of leave, which was not granted. He came back almost a year thereafter and, according to him, he resumed duty on the 8th of October, 1964. He was compelled to take leave. According to the appellant, before the Supreme Court, he fell ill on 7.11.1964 and could not attend to work until he got the order of removal retrospectively from 4.1.1964. His case was that he had been dismissed from service in violation of the Constitutional guarantee under Article 311 of the Constitution of India inasmuch as, he was not given any opportunity to explain his position. The Supreme Court observed:-

"It is true that the order of removal says that:

"X X X it is clearly proved that Shri Haque has continuously, of his own sweet will, been on leave from 4.1.64, without obtaining previous permission, that his work as local auditor, co-operative Society, has always been quite unsatisfactory and that he was given sufficient opportunity to make improvement in his work but still it did not produce any effect on him."

The order further says:

"As Haque has been an old (?) local auditor, his services are, in view of the above facts, terminated with effect from the forenoon of 4-1-64."

But, a glance at the counter-affidavit filed on behalf of the respondent shows that the appellant had been given a number of chances to improve his work about the unsatisfactoriness of which he had been informed, that he had probably deserted his post of duty because he was unable or unwilling to work, that he had made a number of presentations, and also that before any action was taken against him, the District Audit Officer Co-operative Societies, Gaya, had asked him to explain, by means of a Memo dated 11.1.64, why he had been absent for so long from work without permission. It is stated in the counter-affidavit that the communication sent to him by registered post was returned as he could not be found. After that two other communications dated 5-9-1964 were sent to him asking him to explain his conduct, but he did not care to reply to them. Hence he had to be removed from service for having left his post of duty without any authority for a very long period. The appellant did not attempt to explain his omissions satisfactorily even in his affidavits filed in the High Court. In reply to the counter-affidavit filed on behalf of the respondent he merely stated, in an

affidavit, that he reaffirmed his previous assertions. This is really no Explanation. It is not even a specific denial.

Learned counsel for the appellant has cited cases on the protection of Article 311 of the Constitution to Government servants including temporary Government servants. He has relied especially on Jagdish Mitter Vs. The Union of India (UOI), as he had done in the High Court also. It is true that the High Court found that the unsatisfactory record of the appellant was merely a motive for the termination of his service and that he was not actually punished. After having been taken through the assertions made by both sides, we have no hesitation in coming to the conclusion, that even if the appellant was being punished, so that Article 311 could apply, he had been, in the circumstances of the case, given sufficient opportunity to explain his conduct. He had failed to avail of that opportunity. It could not, Therefore, be said that the requirements of natural justice or of Article 311 of the Constitution had been contravened. In any case, on the facts before us, we think that it will be useless to afford any further opportunity to the appellant to show cause why he should not be removed from service. The undenied and undeniable fact that the appellant had actually abandoned his post of duty for an exceedingly long period, without sufficient grounds for his absence, is so glaring that giving him further opportunity to disprove what he practically admits could serve no useful purpose. It could not benefit him or make any difference to the order which could be and has been passed against him. It would only prolong his agony.

On the view we have adopted on the facts of this case, it is not necessary to consider the further question whether any notice for termination of services was necessary or duly given on the assumption that he was not punished. We do not think that there is any question involved in this case which could justify an interference by us under Article 136 of the Constitution with the judgment of the High Court. That power is exercised only on showing substantial injustice and not for merely technical flaws in a proceeding."

The judgment of the Constitution Bench in Jai Shanker's case was not considered by the learned Judges of the Supreme Court.

20. In L. Robert D'souza Vs. Executive Engineer, Southern Railway and Another, the appellant before the Supreme Court was working in Southern Railway. On the 8th of October, 1974, the Executive Engineer(Construction) Ernakulam, wrote to him that his services were deemed to have been terminated w.e.f.18th of September, 1994. The relevant portion of the letter reads as under:-

"You have absented yourself unauthorisedly from 18-9-1974 and hence your services are deemed to have been terminated from the day you have absented yourself. Please note.

Since you are no longer on the rolls of this office you should vacate the quarters allotted to you immediately failing which action will be taken to evict you."

21. The case of the appellant was that up to the date of this order he had rendered 20 years service in the Railways and he was victimised and the Railways were guilty in indulging in unfair labour practice. The Full Bench of the Kerala High Court held that there was no retrenchment and dismissed the writ petition. The appellant took up the matter to the Supreme Court. The Supreme Court held that the termination of service in that case amounted to retrenchment and it was bad as he did not comply with pre-conditions to valid retrenchment. Here again, the judgment of the Constitution Bench of the Supreme Court is not referred to.

22. In Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , two learned Judges of the Supreme Court held void the provisions of the rules in Central Inland Water Transport Corporation Limited Service Discipline and Appeals Rules, 1979. The Rule 9 was held to be void u/s 23 of the Contract Act, 1872. Rule 9 reads as under:-

"9. Termination of Employment for Acts other than Misdemeanour.

(i) The employment of a permanent employee shall be subject to termination on three months" notice on either side. The Company may pay the equivalent of three months" basic pay and dearness allowance, if any, in lieu of notice or may deduct a like amount when the employee has failed to give due notice.

(ii) The services of a permanent employee can be terminated on the grounds of "Services no longer required in the interest of the Company" without assigning any reason. A permanent employee whose services are terminated under this clause shall be paid 15 days" basic pay and dearness allowance for each completed year of continuous service in the Company as compensation. In addition he will be entitled to encashment of leave at his credit."

Here also the judgment of Jai Shanker"s case is not referred to.

23. In Bank of India"s case 1992 SCC (L&S) 268, the question was: Whether the husband and wife who are employed under the Government or public sector undertaking could claim to be posted in the same place as a matter of right? That was rejected by the Supreme Court.

24. In Gujarat Electricity Board and Another Vs. Atmaram Sungomal Poshani, , two learned Judges of the Supreme Court had to decide the scope of Regulation 113 of the Gujarat State Electricity Board Service Regulations. That Regulation reads as under:-

"The continued absence from duty or overstay, in spite of warning, to return to duty shall render the employee liable to summarily discharge from service without the necessity of proceedings under the Gujarat Electricity Board, Conduct, Discipline and Appeal Procedure."

The Supreme Court held:-

"The above Rule provides that if an employee of the Gujarat Electricity Board

continues to remain absent from duty or overstays the period of sanctioned leave and in spite 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, under the Gujarat Electricity Board, Conduct, Discipline and Appeal Procedure. Regulation 113 confers wide powers on the authorities to summarily discharge an employee from service, if he continues to be absent from duty in an unauthorised manner and refuses to join his duty even after warning. Under the disciplinary rules detailed procedure is required to be followed for removing an employee from service but Regulation 113 provides for summary discharge from service. Before this power is exercised, two conditions must be satisfied; Firstly, the employee must be found to be absent from duty without leave or overstaying the period of sanctioned leave, and, secondly, he failed to join his duty even after a warning. The object and purpose of giving warning is to remind the delinquent employee that if he continues to be absent from duty he would be liable to action under Regulation 113 and to afford him an opportunity to make amends by joining his duty. If even thereafter he fails to join duty, his services are liable to be terminated by an order of discharge. It is noteworthy that the validity of Regulation 113 was not challenged before the High Court and the parties proceeded on the assumption that Regulation 113 was valid and applicable to the respondent's service. The Chief Engineer discharged the respondent from service as he had continued to remain absent from duty w.e.f. March 30, 1974 to May 27, 1974. The Division Bench of the High Court held that no warning as contemplated by Service Regulation No.113 had been issued to the respondent nor he had been afforded any opportunity of showing cause before the impugned order of discharge was passed and consequently the order of discharge was null and void being contrary to Service Regulation No.113 itself. On perusal of the material on record we are of the opinion that the view taken by the High Court is not sustainable as there is sufficient material on record which shows that warning had been issued to the respondent before the order of discharge was issued."

The judgment in Jai Shanker's case was not considered by the Supreme Court.

25. In *Rahul Butalia Vs. State Bank of India*, , *Anil Dev Singh, J.* had to consider the Rule 92 of the State Bank of India (Supervising Staff) Service Rules, 1975. The services of the writ petitioner therein were dispensed with on the ground that he was on unauthorised absence. That was challenged as being in violation of the State Bank of India (Supervising Staff) Service Rules, 1975. The learned Judge held:-

"Be that as it may, Rule 92 permits the authority to forfeit the service of an employee in case he remains absent. A conscious decision has to be taken by the authority in regard to the forfeiture of appointment of an employee. This rule does not speak of any deemed voluntary abandonment of or resignation from service on account of absence of the employee nor does it envisage an employee losing his service automatically for remaining absent without leave. Before the

services of an employee are determined for remaining absent, whether it is by way of termination, forfeiture, deemed voluntary abandonment of or resignation from service, he must be given proper opportunity to explain the reasons for his absence. Besides he must be provided with an opportunity to adduce evidence in support of his case. Even when Rule 49 is not invoked by the bank and action is sought to be taken under Rule 92 of the Rules such an opportunity is required to be given in accordance with the principles of natural justice."

26. In *B.G. Saraswat Vs. Engineers India Ltd.*, , the Division Bench of this Court had to consider the question, whether the striking off of the name of an employee from rolls, on the ground that he was on long absence without permission and, Therefore, he committed misconduct, without giving any opportunity to him was valid? The Division Bench considered the case in *D.K. Yadav Vs. J.M.A. Industries Ltd.*, . The Division Bench observed:-

"In *D.K.Yadav Vs. J.M.A.Industries* the respondent vide its letter dated December 12, 1980 intimated that the appellant wilfully absented from duty continuously for more than eight days from December 3, 1980 without leave or prior information or previous permission from the management and Therefore he was deemed to have left the service of the company on his own and lost his lien w.e.f. December 3, 1980. In this case reliance was placed on Clause 12(2)(iv) of its Certified Standing Order. The appellant in his letter dated December 3, 1980 had explained the circumstances in which he was prevented from joining duty but he was not allowed to join the duty. The Labour Court has upheld the termination of his service. On appeal it was held by the Supreme Court that automatic termination under Certified Standing Order on absence without or beyond the period of sanctioned leave for more than eight days without holding any domestic inquiry or affording any opportunity to the workman was violative of principle of natural justice, Articles 14 and 21 of the Constitution and also Section 25-F of Industrial Disputes Act."

27. In *Uptron India Limited Vs. Shammi Bhan and Another*, , the Supreme Court noticed the relevant Certified Standing Orders. In paragraph 12 of the judgment, their Lordships had stated:-

"12. In pursuance of the above powers, the petitioner framed its own Standing Orders which have been duly certified. Clause 17(g) of the Certified Standing Orders, which constitutes the bone of contention between the parties, is quoted below:-

"The services of a workman are liable to automatic termination if he overstays on leave without permission for more than seven days. In case of sickness, the medical certificate must be submitted within a week."

In paragraphs 13 to 19 and 21 their Lordships observed:-

"13. It was in pursuance of the above provision that the services of the respondent were terminated by the petitioner by observing in its letter dated

12th April, 1985, as under:

"The services of Mrs. Shammi Bhan, Token No.158, Operator ceased automatically from Uptron Capacitors Ltd., Lucknow with immediate effect, in accordance with the clause 17(g) of the Certified Standing Orders of Uptron Capacitors Limited."

14. Respondent NO.1, admittedly, was a permanent employee.

15. Conferment of "permanent" status on an employee guarantees security of tenure. It is now well settled that the services of a permanent employee, whether employed by the Government, or Govt. company or Govt. instrumentality or Statutory Corporations or any other "Authority" within the meaning of Article 12, cannot be terminated abruptly and arbitrarily, either by giving him a month's or three months' notice or pay in lieu thereof or even without notice, notwithstanding that there may be stipulation to that effect either in the contract of service or in the Certified Standing Orders.

16. This Court in West Bengal State Electricity Board and Others Vs. Desh Bandhu Ghosh and Others, , held that any provision in the Regulation enabling the management to terminate the services of a permanent employee by giving three month's notice or pay in lieu thereof, would be bad as violative of Article 14 of the Constitution. Such a Regulation was held to be capable of vicious discrimination and was also held to be naked "hire and fire" rule. This view was reiterated in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

17. Again in O.P. Bhandari Vs. Indian Tourism Development Corpn. Ltd. and Others, , this Court held that Rule 31 (v) of the Indian Tourism Development Corporation (Conduct, Discipline & Appeal) Rules, 1978, which provided that the services of a permanent employee could be terminated by giving him 90 days' notice or pay in lieu thereof would be violative of Articles 14 and 16 of the Constitution.

18. The whole case law was reviewed by the Constitution Bench in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress & Ors. JT 1990 (3) 725, and except the then Chief Justice Sabyasachi Mukharji, who dissented, the other 4 Judges reiterated the earlier view that the services of a confirmed employee could not be legally terminated by a simple notice.

19. This being the legal position, the action taken against the respondent who as pointed out earlier, was a permanent employee, was wholly illegal.

21. This Court in D.K. Yadav Vs. J.M.A. Industries Ltd., has laid down that where the Rule provided that the services of an employee who overstays the leave would be treated to have been automatically terminated, would be bad as violative of Articles 14, 16 and 21 of the Constitution. It was further held that if any action was taken on the basis of such a rule without giving any opportunity of hearing to the employee, it would be wholly unjust, arbitrary and unfair. The

Court reiterated and emphasised in no uncertain terms that principles of natural justice would have to be read into the provisions relating to automatic termination of services."

28. The legal position that emerges out of the above exegesis is that the second respondent cannot dispense with the services of the petitioner without giving an opportunity to explain his position. The question of imposing punishment would arise only after sufficient opportunity is given to the petitioner.

29. For these reasons, the impugned order is set aside and the second respondent is directed to issue show-cause notice to the petitioner in accordance with law and decide the issue after complying with the principles of natural justice, and then decide the imposition of penalty in the light of principles laid down by the Supreme Court in *Dahanu Taluka Environment Protection Group and Another Vs. Bombay Suburban Electricity Supply Company Ltd. and Others*, , which deals with the quantum of punishment to be imposed in the event of any officer being found guilty.

30. The petitioner shall be entitled to his subsistence allowance as per the rules from the date of the impugned order up to the date of the final order to be passed by the second respondent.

31. The writ petition stands disposed of.

32. There shall be no orders as to costs.