

(1967) 02 KAR CK 0018

In the Karnataka High Court

Case No : Regular Second Appeal No. 557 of 1964

State of Mysore

APPELLANT

Vs

Anthony Benedict

RESPONDENT

Date of Decision : 01-02-1967

Acts Referred:

Constitution of India, 1950 — Article 311
Mysore Civil Services Rules, 1958 — Rule 162

Citation : (1971) CriLJ 1638 : (1968) 2 LLJ 448 : (1968) 1 MysLJ 519

Hon'ble Judges : A.R. Somnath Ayyar, J

Bench : Single Bench

Judgement

1. The appellant is the State Government and the decree challenged is one made by the Subordinate Judge in a suit brought by the plaintiff who was a peon in the Judicial Sub-Magistrate's Court, Udipi. He was transferred on 14 November, 1957 to the Court of the Subdivisional Magistrate, Puttur, and, after he was so transferred he did not report himself to duty but made applications time and again for the grant of leave. The last application was made on 4 October, 1958 in which he asked for four months' leave. On 29 November, 1958 the District Magistrate of Mangalore refused the leave and directed the plaintiff to report himself to duty by a particular date. On the plaintiff not reporting to duty in that way, the District Magistrate made an order on 22 December, 1958 that the plaintiff had lost his lien on his post "in the criminal judiciary in the district of Kanara."

2. In his suit the plaintiff sought a cancellation of this order and a decree for arrears of salary. The Munsif dismissed the suit, but the Subordinate Judge, in the appeal preferred by the plaintiff, made a decree setting aside the order of the District Magistrate. He made a declaration that the plaintiff still continued to be in Government service. With respect to the arrears of salary claimed, the Subordinate Judge observed that that was a matter which should be investigated in another proceeding.

3. This decree of the Subordinate Judge has produced an appeal by the State and a cross-objection by the plaintiff. The State complains against the decree by which the Subordinate Judge set aside the District Magistrate's order, and the plaintiff's cross-objection relates to the refusal of the decree for arrears of salary.

4. In support of the proposition that the impugned order made by the District Magistrate was within his competence, Sri Venkatachala, the learned Government pleader, depended upon rule 162 of the Mysore Civil Services Rules which provides that a Government servant who remains absent after the end of his leave shall cease to have his lien on his appointment. But it is clear that when the District Magistrate stated in his order that the petitioner had lost his lien on his appointment, that order amounted to his removal and could not have been made except in adherence to the provisions of Art. 311 of the Constitution. And it was not made in that way. The argument that such removal was possible under rule 162 of the Mysore Civil Services Rules as it then stood cannot be accepted since that rule, which in effect provides for removal by providing for the cessation of the lien, in so far as it is repugnant to the provisions of Art. 311 of the Constitution, is void.

5. That was the view taken by the Supreme Court in *Jai Shanker Vs. State of Rajasthan*, in which it was explained that Regn. 18 of the Jodhpur Service Regulations which provided that an employee who did not report himself for duty after the end of his leave, should be considered to have sacrificed his appointment, in effect provided for his removal within the meaning of Art. 311 of the Constitution.

6. The appeal preferred by the State Government fails, and I dismiss it with costs.

7. In support of the cross-objection, Sri Raghavendra Rao submitted that the investigation into the claim for arrears of salary should not have been relegated by the Subordinate Judge to another forum. It is clear that he is right in making this complaint.

8. The question whether the plaintiff was entitled to any arrears of salary was one which the Subordinate Judge should have himself decided. He could not have abdicated his jurisdiction to render a decision on that question. So, it now becomes my duty to investigate the question whether the plaintiff is entitled to arrears of salary claimed by him or to any part thereof. Now, it is clear from the latest leave application which the plaintiff made, that he asked for four months' leave from 7 October, 1958 and that application means that at least until 7 February, 1959 he was not in a position to report himself to duty since it is his case that leave was applied for by him on medical grounds.

9. The principle by the application of which the quantum of the arrears of salary which are properly claimable by the plaintiff may be determined, is that he would be entitled to arrears of salary only during that period during which after recovery from his illness he would have worked, until the date of his retirement

arrived. On that question, there is paucity of evidence and neither side produced any definite or clear evidence.

10. In one part of his cross-examination, the plaintiff was asked when he was in the box whether the pain in his eye still continued and he stated that he still did have it and therefore did not find it possible to work. But that evidence does not mean that at all antecedent points of time he was not in a position to work or report himself to duty. That evidence only means that on the date he was giving evidence, the old pain was still troubling him. But he gave this evidence in February, 1963, and according to the plaintiff's case, he would have normally retired on 8 October, 1962. So, the incapacity for work in 1963 does not justify the inference that there was similar incapacity at all relevant times. Of this aspect of the matter, there was no discussion by the Subordinate Judge, who abstained from making an adjudication on this part of the suit.

11. So, it appears to me that while the decree of the Subordinate Judge in so far as it is in favour of the plaintiff should be maintained and should be allowed to remain undisturbed, the question relating to the claim made for arrears of salary has to be remitted to the Court of first instance so that there may be a fresh disposal of that issue according to law after both sides are afforded an opportunity to produce all the evidence which they wish to produce in regard to that matter.

12. The result is that the cross-objection succeeds, and I set aside the decree made by the Subordinate Judge refusing to make a decree for arrears of salary. I remit that part of the suit relating to arrears of salary to the Court of first instance to be disposed of afresh as directed by this judgment.

13. There is one further modification to be made in the decree of the Subordinate Judge with respect to cost. The decree says that the plaintiff is entitled to his cost from the defendant but that he shall pay the court-fee payable on the memorandum of appeal and the plaint, to Government since the suit and the appeal were both instituted in forma pauperis. But this is a very cumbersome direction since what the plaintiff has to do is to pay the court-fee in the first instance and then recover it from the Government who are the defendants. Instead, I make the direction that the plaintiff need not pay any court-fee in any of the three Courts. So what is payable as costs in the two Courts below by the defendant to the plaintiff would be the advocate's fee and the other costs.

14. In the cross-objection, I make no direction in regard to costs.