

(1957) 07 MAD CK 0050
In the Madras High Court

Union of India (UOI)

APPELLANT

Vs

Shanmugham (C.)

RESPONDENT

Date of Decision : 23-07-1957

Acts Referred:

Constitution of India, 1950 — Article 311
General Clauses Act, 1897 — Section 16
Government of India Act, 1935 — Section 240

Citation : (1957) 2 LLJ 668 : (1957) 70 LW 965

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Judgement

Ramaswami, J.—This second appeal is preferred by the Union of India represented by the General Manager of the Southern Railway against the decree and judgment of the learned Subordinate Judge of Tiruchirappalli in O.S. No. 294 of 1951 and confirmed by the learned District Judge of Tiruchirappalli in A.S. No. 396 of 1953.

2. The plaintiff Shanmugham was appointed as a sepoy or watchman in the watch and ward department in Tiruchirappalli Junction in 1947.

3. On 12 January 1948 the Assistant Station Superintendent brought to the notice of the Superintendent, Watch and Ward, that this Shanmugham, while a surprise check was made on 12-15 hours on 7 January 1948, was found sleeping at his post; see Ex. B. 1.

4. Thereupon the superiors of this watchman citing the report received called upon him to explain why he neglected his duty by being found sleeping when on duty at 12-15 hours on the night of 7 January 1948; see Ex. A. 1.

5. Then this Shanmugham sent an explanation through proper channel that he did not sleep at all when on duty, that he had reason to think that the havildar and the circle inspector who inspected that day did not find him neglecting his duty that day; see Ex. B. 2.

6. Then a regular chargesheet was framed on 19 March 1948 against this Shanmugham embodying all the particulars and calling on him to show cause why penalty 8, Rule 1702 R, of the Discipline and Appeal Rules, viz., removal from service or any lesser penalty, should not be imposed; see Ex. B. 3.

7. Shanmugham submitted his explanation which repeated only what he had stated before and adding that he might be provided with copies of the reports made against him and that if he is found guilty as per Rule 1712 (sic) of the Discipline and Appeal Rules to allow him a personal interview to plead his cause assisted by another railway servant; see Ex. B. 4.

8. Thereupon this Shanmugham was sent a communication by the General Manager asking him to see him with his representative on 11 May 1948 in connexion with the enquiry on his report; a copy of it was sent to the superior of this watchman to attend office in connexion with this enquiry; see Exs. B. 5 and B. 6.

9. Then there was a regular enquiry and Sri V. Ramachandra Naidu and V. Ramachandra Ayyar who made the inspection and found this watchman sleeping were examined. They were cross-examined by this Shanmugham. The depositions of these two persons are Exs. B. 7 and B. 8. Their depositions make it clear that this watchman was sleeping as charged. Nothing was elicited in cross-examination to discredit their testimony.

10. Then the officer who made the inquiry made the following order (Ex. B. 9) on 12 May 1948:

This sepoy appeared before me without a representative. The charges were notified to him. Deputy S.S. was also present and he was cross-examined by me in the presence of the sepoy. The sepoy also cross-examined the Deputy S.S.

The sepoy maintained he was not sleeping but in view of the evidence of the Deputy S.S., who was at the time acting as S.S., also that of the Deputy S.M., V. Ramachandra Ayyar, I am convinced this sepoy was asleep at his spot.

Apart from this man denying the charge of sleeping, he has tried to make out that the acting S.S. mistook him for a passenger. In my opinion he is unsuitable for the watch and ward. Remove him from service giving a second opportunity.

11. It will be seen that at this stage the department taking a lenient view obviously because this watchman was recently appointed and the railway department did not want to spoil his career wanted to treat the matter not as one of disciplinary jurisdiction but to be dealt with in the exercise of their undoubted powers under the contract embodying the terms of service, as a watchman, viz., giving him a second opportunity, and find out whether he was suitable to be retained as a watchman or his services should be dispensed with as a watchman but without jeopardizing in any way his further chances of employment. It is common ground that one of the terms of the contract of service between this Shanmugham and the railway department was that he

would be given one month's notice before his services were terminated.

12. After giving a second opportunity this Shanmugham was notified that his services would be terminated on 10 July 1948; see Exs. A. 3, B. 11 and A. 4.

13. Then there was an appeal by this Shanmugham and the termination of service was confirmed on appeal. Shanmugham thereafter appealed to the Secretary to the Railway Board. That appeal was rejected as no second appeal lay to the Railway Board; see Ex. A. 5.

14. Thereafter notices were exchanged between this Shanmugham and the railway department prior to the filing of this suit; see Exs. A. 7 and A. 8.

15. Then this Shanmugham filed the suit O.S. No. 294 of 1951 in the pauper form for a declaration that the order of the dismissal dated 8 June 1948 terminating his services with the South Indian Railway is illegal, ultra vires, void and inoperative and that he is entitled to be reinstated in service or in the alternative for damages for Rs. 3,500.

16. Both the courts below came to the conclusion that inasmuch as proceedings had been initiated to show cause why Penalty Rule 8 of Rule 1702 R of the Discipline and Appeal Rules, viz., removal from service or any lesser penalty, should not be imposed, it was not open to the railway department to terminate the services of this Shanmugham under the terms of his contract of service; and secondly that the enquiry made as narrated above did not satisfy the courts that the prescribed procedure had been followed, and that therefore the plaintiff was entitled to a declaration, that the order of dismissal dated 8 June 1948 terminating his services with the railway is illegal, ultra vires void and inoperative. The plaintiff was given his costs and the court-fee due to the Government was made recoverable from the Union of India represented by the General Manager of the Southern Railway. Hence this second appeal.

17. The principles which should govern claims of this nature have been set out in a Bench, decision of this Court, *Karunanidhi Naidu v. State of Madras* A.S. No. 433 of 1951 : 1956 I.L.J. 347, by Govinda Menon, J., and myself. In this connexion reference may also be made to the exhaustive discussion at p. 1265 and following of dismissal, etc., of persons employed in civil capacities under the Union or State: Article 311 of A.S. Chandra Constitutional Right and Limitation, Vol. II (1956) (Wadhwa & Co.) and a succinct exposition in Sri N.R. Raghavachariar's *the Constitution of India*, p. 392 (1951) (P. Varadachary & Co.). See also Aggarwallah *Fundamental Rights and Constitutional Remedies*, Vol. III (1956) (Metropolitan Book Company, Ltd.) and Basu's *Commentary on the Constitution of India*, 2nd Edn., p. 752.

18. In order to determine the principles on Which the jurisdiction of the civil court, in a suit, can be exercised to give a declaration that a Government servant continued in service till the filing of the plaint, based on a finding that the order of dismissal was void and has to be regarded as non-existent or ineffective, we

must first of all examine the background to the general law of "master and servant" and then consider the special position of Government servants in India.

19. In regard to the law of "master and servant," falls under three heads, viz., private employment, employment by statutory bodies and service under the Crown or State. The first two do not arise here and the general principles relating to contract of service falling upon the first head will be found fully discussed in *Nokes v. Doncaster Amalgamated Collieries* 1940. A.G. 1014; and the general principles relating to employment by statutory bodies giving rise to both suits for declarations of the invalidity of their orders with the result that the plaintiff will be deemed to continue in service as well as the alternative remedy of damages, will be found discussed in *Barnard v. Dock Labour Board* (1952) 2 All. E.R. 424; and *Vine v. National Dock Labour Board* (1956) All. E.R. 1. We shall proceed to discuss therefore the service under the Crown or State.

20. The English law regarding service under the Crown is that a civil servant holds office at the pleasure of the Crown. It has its origin in the Latin phrase *durante bene placito* (during pleasure), meaning that the tenure of office of a civil servant except where it is otherwise provided by statute,, can be terminated at any time without cause assigned. The true scope and effect of this expression is that even if a special contract has been made with the civil servant, the Crown is not bound thereby. In other words, civil servants are liable to dismissal without notice and there is no right of action for wrongful dismissal, that is, that they cannot claim damages for premature termination of their services; see *Fraser's Constitutional Law*, p. 186; *Shenton v. Smith* 1895 A.C. 229, 234; *Dunn v. the Queen* (1896) 1 Q.B. 116 cited in the *State of Bihar v. Abdul Majid* 1954 S.C.E. 786 : 1954 I.L.J. 678.

21. But if there is an order of dismissal or other order such as suspension, in order to signify the King's pleasure in the matter, the order must be by an officer or authority competent to signify the King's pleasure. This question of competence will be governed by the principle enacted in Section 16 of the General Clauses Act, 1897, which provides that a power of appointment includes the power of suspension or dismissal. Subject to this, the Government servant has no remedy in England: see *Street's Governmental Liability* under the heading "Civil Service" at pp. 111 to 119 and *Parkin's Administrative Law*, p. 98, for the position in America.

22. Turning to India, the relevant principles have to be deduced from Section 240 of the Government of India Act, 1935, or Article 311 of the Constitution of India, relating to Government servants. Section 240 of the 1935 Act began with the general provision that every officer holds office during His Majesty's pleasure except as otherwise expressly provided and this is now repeated in Article 311(1) of the Constitution. The second part of Section 240 of the Government of India Act, 1935, is re-enacted in Article 311 of the Constitution. In short, Article 311 reproduces Sub-sections (2) and (3) of Section 240 of the Act of 1935, with the addition of proviso (c) to Clause (2), which is new and irrelevant for our purpose.

Therefore, the second part is the express provision which makes an exception to the general rule that service is during pleasure.

23. Before analysing the cardinal requirements under Sections 240(2) and 240(3) of the 1935 Act or Article 311 of the Constitution, two matters will have to be noticed. It is now well settled that this provision covers only dismissal, reduction in rank or removal from service resorted to as punishment. A mere termination of service except as punishment is not covered by Section 240 of the 1935 Act or Article 311 of the Constitution: *Shyam Lal Vs. The State of Uttar Pradesh and The Union of India (UOI)*, , *Dayanidhi Rath Vs. B.S. Mohanty*, , *Bhojraj v. Chief Secretary of Saurashtra* AIR 1952 Sau. 40; *Har Prasad Vs. Union of India (UOI)* and Another, A Government servant cannot also sue for his salary in India as in England: *State of Bihar v. Abdul Majid* 1954 S.C.R. 786 : 1954 I L.J. 678; *Om Prakash Gupta v. State of Uttar Pradesh* 1956 I.L.J. 1. But this does not affect the consideration of the principle on which the declaration has to be granted.

24. In such matters the civil court is not sitting in appeal over the decision of the departmental authorities. Strict laws of evidence are not applicable to departmental proceedings? *Sisir Kumar* 1955 Cal. 183. Violation of ancillary, incidental and unessential rules are not material? *Joseph v. State of Travancore-Cochin* 1953 T.C. 130. In *I.M. Lall v. Secretary of State* AIR 1944 Lah. 240 their lordships have observed at p. 258 as follows:

We are not concerned with the question whether Mr. Brayne's conclusions are correct or not, nor even whether they are supported by sufficient evidence. We cannot sit in appeal on his judgment. Any appeal that lies from these findings is only of an administrative kind and the benefit of this the plaintiff has already had. We cannot even insist that the procedure should be that employed in courts of law any more than that the standards of proof should be those insisted upon in law courts. The conclusions and findings are and can be relevant only to find out whether or not the procedure employed has caused prejudice to the plaintiff in the course of the inquiry by hampering or embarrassing him in his defence and whether the principles of natural justice have in this respect been violated in any way....

To sum up at this stage a public servant can file a suit in enforcement of his rights; (a) where there is a violation of constitutional rights, (b) where there is a violation of statutory provisions, (c) where there is violation of rules of natural justice, but cannot complain where constitutional and statutory provisions are complied with: *Chittoor Varadaraja Ayyar* 1953 T.C. 140, or question discretion of authority vested in authorities under the statute or the rules or seek redress where rules are merely administrative? *Jagannath* 1954 All. 629 : 1937 P.C. 31 : 1951 Mad. 882 or in cases of termination of service according to the terms of the contract 1955 All. 496 , *Sharda Prasad v. A.P.U.P.*, *Gundurao* AIR 1955 Hyd. 260 ; *Anima Munshi Vs. Engineer-in-chief and General Manager, Calcutta Telephone District*, , even if an allegation of misconduct is specifically stated

provided the termination is on the terms and services of the contracts- Dalel Singh Vs. Honorary Secretary, Co-operative Union Ltd., U.P., Lucknow and Others, ; Mohan Singh AIR 1954 Pepsu 136.

25. The essential factors which a civil court. will examine in order to come to the conclusion whether a declaration that the Government servant continued in service till the date of the filing of the suit on the foot that the order of dismissal was void and has to be regarded as non-existent or ineffective, are four in number:

- (i) whether the plaintiff haft been dismissed by an authority which appointed him;
- (ii) whether before he was dismissed from service he has been given a reasonable opportunity of showing cause against the action proposed to be taken;
- (iii) in determining point (ii) whether the procedure adopted in the departmental enquiry has so prejudiced the plaintiff that it has resulted in the denial of a reasonable opportunity; and
- (iv) whether on the whole the principles, of natural justice have not been violated.

If there are merely defects in procedure without any contravention of the statutory provisions of Sections 240(2) and 240(3) of the 1935 Act, the plaintiff will not have a cause of action to file a civil suit. In the case of infringement of the rules of procedure his only right will be to pursue the remedies provided by the rules governing his services; that is to say, he should prefer his appeal to the authority constituted to hear it and it will have no cause of action for a civil suit. This has been recognized in the decision in Rangachari v. Secretary of State ILR 1937 Mad. 857, which was an appeal from R.T. Rangachari Vs. Secretary of State, Venkatarao v. Secretary of state ILR 1937 Mad. 532; and T.C. Nilamegham Pillai and Another Vs. Secretary of State, . These principles have been reiterated by their lordships of the Privy Council in Secretary of State v. I.M. Lall 1945 F.C. 47. The question whether in any given case an accused officer has been given a reasonable opportunity of showing cause is a question of fact as observed by Spens, C.J., in Secretary of State v. I.M. Lall 1945 F.C. 47. It is in accordance with the above principles that this case should be judged.

26. The form of relief given in such cases is specific relief by way of declaration. After discussing the nature of the opportunity to be given u/s 240 of the 1935 Act, their lordships in Lall case 1945 F.C. 47 amended the declaration as follows:

...the declaration should be varied so as to declare that the purported dismissal of the respondent on 10 August 1940 was void and inoperative, and that the respondent remained a member of the Indian Civil Service at the date of the institution of the present suit on 20 July 1942. Any further action by the Crown that may have occurred since the raising of the action is not covered by the present suit.

See "also observations at p. 67; and also Saubhas Chand v. State of Sau : 1954 Sau. 146.

The matter is not fully discussed but it is important to consider on what principle such a declaration is given.

27. The basic principle, as has been stated above, is that the officer holds office during the King's pleasure. But there is a statutory provision that dismissal and removal or reduction in rank can be done only by an authority not subordinate to that by which he was appointed. In England the general principle is that only the person having authority to appoint will have the authority to dismiss and therefore a lower authority cannot do that because it would not be proper signifying of the King's pleasure. On the other Hand, in India our decisions are based on the language of Article 311(1) of the Constitution which refers to the authority by which the accused officer was appointed and entails that even though an authority would have appointed him, if the appointment was actually made by a higher authority, then the power of dismissal, suspension, reduction in rank, etc., would be vested in the authority which in fact appointed him or a higher authority. It has also been held that an appeal or revision that has been heard by a competent authority, will not validate the order passed by a subordinate officer; *Suraj Narain Anand v. North West-Frontier Province* 1941 F.C.R. 37. The second requirement relates to the manner in which the power would be exercised. Now, the principle on which the court will regard an order, either passed by an incompetent authority or not exercised sub modo, is this: The Crown or the Constitution has provided by statute two things: the authority and the manner in which the power should be exercised. If the power is exercised by an incompetent authority or is exercised by a competent authority but not according to the manner prescribed by the statute, then the order itself should not be attributed to the Crown or the State as being an incompetent order. Therefore it is null and void and the court grants a declaration. This position has been well put in *Larson case* (1948) 337 U.S. 682; 93 L. Ed. 1628, At p. 1636 it is observed:

On a similar theory, where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not Sovereign actions. The officer is not doing the business which the Sovereign has empowered him to do or he is doing it in a way which the Sovereign has forbidden. His actions are ultra vires his authority and therefore may be made the object of specific relief.

The point whether a specific relief by way of a declaration would be sufficient for giving relief to the accused public servant and secondly, whether the court has got a discretion in granting that relief, will have to be considered finally. In regard to the former, when the court gives a declaration the Sovereign or State will note that the purported act or order is illegal and will act according to the court's views. This has been well put by Lord Reading in *Rex v. Speyer* (1916) 1 K.B. 595 as follows:

This is the King's court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown.

See also Dyson (1911) 1 K. B. 410 at 421 and Wigg 1927 A. C. 674. It is equally well settled that being specific relief it is discretionary. This is discussed in Vine case (1956) 1 All. E.R. 1. It is a case relating to a statutory body against which both the specific relief and the alternative relief of damages could be available, as already mentioned. Singleton, L.J., discusses it at p. 8 and Parker L.J., discusses it at p. 13. Being a discretionary relief, the court will have to follow the well-established rules relating to specific relief. For example, the court will not declare that the officer had continued in service till the date of the plaint, if for instance the plaintiff had been, prior to the suit, in any alternative employment, because a declaration contrary to facts cannot be given. Similarly, if the plaintiff comes to court with the knowledge of something which he did not put before the authorities at the earlier stages, the court may in its discretion refuse the declaration.

28. The sum and substance of all this analysis is that the general rule that the service is during pleasure of the Crown or State is protected only to the extent and within the limits prescribed by the relevant statute and while courts will take care to see that the cardinal requirements prescribed by the statute are fulfilled and the principles of natural justice have not been violated and the public servant has had a fair deal, equally the court will have discretion to refuse in suitable cases a declaration on the well-settled principles applicable to specific relief.

29. Finally, we have got to see what are the principles of natural justice? By natural justice we mean that which is found in equity, in honesty and right and its principles are:

(1) A person must not be a judge in his own cause: *Frome United Breweries v. Bath Justices* 1928 A.C. 586; Halsbury, Hallsham. Vol. IX, Para. 1487, Vol. XVI, Para. 606, Vol. IX, p. 884; *Queen v. Bolingbroke* (1893) 2 Q.B. 347; *Ex parte Workington Overseers* (1894) 1 Q.B. 416; *Reg. v. Justice of Hertfordshire* (1845) 6 Q.B. 853; *Reg. v. Meyer*. (1876) 1 Q.B.D. 173; *Queen v. Justices of Yarmouth* (1882) 8 Q.B.D. 525; *Cooper v. Wilson* (1937) 2 All. B.R.726; and *Moti Lal and Others Vs. The Government of the State of Uttar Pradesh and Others*,

(2) A person must not be condemned unheard: *Reg. v. Huntington Confirming Authority* (1929) 1 K.B. 698 ; *Errington v. Minister of Health* (1935) 1 K.B. 249; and *Horn v. Minister of Health* (1937) 1 K.B. 164.

(3) The decision must be made in good faith : *Marshall v. Corporation of Blackpool*, 1935 A.C. 16; *Jogaram v. State of Madhya Pradesh* 1955 Nag. 160.

30. Bearing these principles in mind, if we examine the facts of this case we find that the department under the terms of the contract of service of this plaintiff

could terminate his services on one month's notice. Article 311(2) does not apply to such cases? Basand Narain 1955 N.U.C. 1765 All. The termination of service here was not as a punishment but only as the result of unfitness for night duty. It would only be case of failure to conform to the requisite standard of physical fitness: Fakitchand 1954 Cal. 566. Persons who are quite efficient otherwise may by poor physical limitation not be able to keep themselves wakeful and be successful as watchmen. That unfittedness of this plaintiff was not decided arbitrarily and capriciously but only on ample and cogent evidence of a convincing nature. In this case there is no question of principles of natural justice*being violated. Charges had been framed, opportunities were given to the plaintiff and plaintiff had been heard and his representations have been weighed and a proper decision had been arrived at. The two stages under Article 311(1) have been kept in mind and there has been enquiry into charges and notice to show cause against proposed removal had been given. Even assuming that this, was a case of disciplinary proceedings and that the department should upto the end treat it only as disciplinary proceedings, there was no room for the civil court to interfere. In fact it is open to the department to take one of several courses open to it be long as it is not unfair to this plaintiff and so long as he is not condemned unheard. It is open to the department in the case of this watchman to dispense with his services after a proper enquiry on his unfittedness for this particular job being shown. That would be a merciful course because that termination does not throw any stigma on his character and will not stand in the way of his getting employed in this very department in other jobs more suited to his physical and mental capacity. Or disciplinary proceedings may be taken or if the dereliction is of a grave character involving public interest and a wide publicity and deterrent punishment is sought a prosecution may be launched. The word "removal" in Article 311 has a narrow and technical meaning involving the concepts of arraignment, guilt, stigma and punishment and future debarring of employment under Government service whereas termination does not? Balai Chand Basak Vs. N. Roy Choudhury, Additional Refugee Rehabilitation Commissioner, West Bengal and Others, . It is for the department to take one or more of these actions and civil courts cannot insist that the department must go on with the disciplinary proceedings which if it had unfavourably ended to this plaintiff would debar him from further employment in Government service. But assuming that this has to be construed as disciplinary proceedings and nothing else? Balai Chand Basak Vs. N. Roy Choudhury, Additional Refugee Rehabilitation Commissioner, West Bengal and Others, the civil court can no doubt go into the question whether there has been an infringement of the statute in the disciplinary proceedings. But in this case nothing more has been alleged and shown than a mere Irregularity in the procedure which cannot confer a right of action in the civil court to the plaintiff. A report which is not referred to at any stage of the inquiry and is not relied upon by the enquiring officer need not be disclosed to the defence even if it existed. This is not a case to which the reasoning of the decision in Vijayaraghava v. Secretary of State 7 Mad. 466 and A pleader v. Judges of the High Court of Madras AIR 1930 P.O. 144 and Harsh

Narayan Singh v. Inspector-General of Police AIR 1954 Vind. Pra. 50 will apply. It will fall within the ambits of the decisions, Haleem v. State of Hyderabad AIR 1955 Hyd. 240, Dayanidhi Rath Vs. B.S. Mohanty, : Prabhodchandra Ghose v. E.E. Canal Division 1955 Cal. 276 : Dr. M. Krishnamoorthy Vs. The State of Madras and Another, : Sisir Kumar Das v. State of West Bengal 1955 Cal. 183; Murugesu v. Collector of Tanjore 1956 M.W.N. Jour. 7 : 68 L.W. Jr. 108; Gaya Prasad v. Union of India 1955 Pat. 305; Madhiram v. D.E.O., Nabha 1955 Pepsu 172; S. Thakoorjea v. State of Madras 1955 And 168 : 1955 N.U.C. Bom. 3843 : 1955 N.U.C. Cal. 2875. On the other hand, in respect of the charge for which the plaintiff was found guilty and removed from service, even if it is construed as such, there was a proper, bona fide enquiry by a competent officer and the enquiry was conducted by him in accordance with rules and the principles of natural justice and the plaintiff was given an adequate opportunity of defending himself in the said enquiry. The opportunity given was real and competent authority under this procedure was able to come to a conclusion different from that tentatively arrived at. Two chances were given firstly to answer charges and secondly opportunity to show cause against the removal proposed to be inflicted. The suit itself was belated. The increasing age of the plaintiff would certainly not make him the fitter for reinstatement as watchman and subserve public interest. Therefore the order of removal of this plaintiff from service is not illegal, ultra vires, void and Inoperative and the plaintiff had no legal cause of action for a civil suit and the courts below should not have granted the discretionary relief.

31. In the result, the decrees and judgment of the lower courts are set aside and the issues are found against the plaintiff and the suit is dismissed and this appeal is allowed with costs. The court-fee on the plaint due to the Government is recoverable from the plaintiff. No leave.