The State of Assam and Others

Vs

Akshaya Kumar Deb

Civil Appeal No. 59 of 1968

(R. S. Sarkaria, A. C. Gupta JJ)

02.05.1975

JUDGMENT

SARKARIA, J. –

1. This appeal is directed against the judgment of the High Court of Assam and Nagaland declaring that the termination of the services of the respondent, being violation of Article 311(2) of the Constitution, was illegal.

2. The respondent, A. K. Deb, joined service as a Lower division assistant in the office of the Superintendent of Veterinary Department, Assam, on 1st April 1937. He was confirmed in that post on 28th August, 1937. He was promoted as upper division Assistant and confirmed as such on 26th August, 1943. He got further promotion as Head Assistant and was confirmed in that post with effect from 20th June, 1946. Thereafter on 26th April 1947, he was appointed as Personal Assistant against a newly created temporary post in higher scale. He continued to work in that post till 18th August, 1949 when he was reverted to the post of head Assistant. On 8th November, 1951, the Director of Veterinary Department drew up proceedings against the respondent on certain charges. As a result, the respondent was reverted to the post of Upper Division Assistant on 15th December, 1952. The respondent on 21st January, 1953 filed an appeal against the order of his reversion on the state Government. The appeal was dismissed on 19th February, 1954, and by order dated 28th August, 1956, the respondent was allowed to join as Head Assistant subject to the production of a medical certificate of fitness. It was further stated in the order that the respondent would be entitled to such leave as admissible under the rules from the date he proceeded on leave until joining the post of Head Assistant on 1st September, 1956, the respondent reported for duty and produced a medical certificate of fitness from the Civil Surgeon, Kamrup. Despite this, he was not assigned any duty. He continued to attend his office till 13th September, 1956 when he was informed that the operation of the order dated 28th August, 1956 of the Government had been suspended Subsequently, by a latter dated 30th October, 1956, the Government informed him that the earlier order had been revised and he should join the post of Upper Division Assistant to which he had been reverted. Against this order of reversion, the respondent unsuccessfully appealed to the State Government. The appeal simply drifted till on 20th February, 1961, he was informed that the appeal did not lie.

3. In the meantime on 12th September, 1956, the Director called for the explanation of the respondent for the latter's absence without leave since 5th September, 1956. The director drew up disciplinary proceedings against the respondent for his disobedience of the Government's order requiring him to join his post and for remaining absent from duty without information. Another show-cause notice was issued on 26th November, 1957 as to why he be not dismissed from service.

The respondent submitted a written statement and prayed for a personal hearing. He also filed an appeal to the Governor on 20th May, 1961. By a letter No. AGV 7/52/280 dated 15th February, 1963, the respondent was informed that he had ceased to be a government servant under F.R. 18 of the Assam Fundamental and subsidiary Rules with effect from 5th September, 1961 on account of his continuous absence from duty for more than five years.

4. To challenge the order, dated 30th October, 1956, of his reversion to the post of Upper Division Assistant, and the order, dated 15th February, 1963, by which it was held that he had ceased to be in government service, the respondent filed petition under Article 226 of the Constitution in the High Court. Later, he did not press his challenge to the order, dated 30th October, 1956, and confined it only to the order, dated 15th February, 1963.

5. After observing that the termination of service under F.R. 18 means that the employee is blameworthy, operates as punishment amounting to "dismissal" from service, the High Court concluded that F.R. 18 which permits termination of the service of a permanent government employee without observance of the requirement of Article 311(2) of the constitution on a ground other than ordinary or compulsory superannuation, must be held to be invalid because such a rule contravenes the constitutional safeguard provided by that Article.

Towards the end of its judgment the High Court said :

> We however, make it clear that we do not declare the petitioner to have continued in the post of head assistant as we have not interfered with the order reverting the petitioner to the post of an Upper Division Assistant. We hold that F.R. 18 is void being hit by Article 311(2) of the Constitution and the termination of the service of the petitioner under this Rule is invalid.

In the result, the High Court allowed the writ petition and directed the Government not to give effect to the impugned order, dated 15th February, 1963.

6. Hence this appeal by the State on a certificate granted under Article 133(1)(c) of the Constitution.

7. The only question that falls for determination is whether the services of the respondent could be terminated under Rule 18 of the Assam Fundamental and Subsidiary Rules, without complying with the procedure prescribed in Article 311(2) of the Constitution ?

8. It is a common ground that no charge was framed against the respondent, no inquiry was instituted nor was he given an opportunity to show-cause against the impugned action.

9. Mr. Naunit Lal, learned counsel appearing for the appellant contends that the termination in question does not amount to "dismissal" or "removal" but is a "cessation" of service which results automatically without any action on the part of the Government from the unilateral conduct of the employees in remaining absent from duty for a period of five years or more. In such a situation, it is maintained Article 311(2) of Constitution is not attracted. Another reason advanced in support of this contention is that, cessation of service under F.R. 18 does not entail forfeiture of the benefits already earned, nor does it debar the servant from re-employment under the Government. In the alternative, it is half-heartedly submitted that show-cause notices were issued to the respondent on 12th September, 1956 and 26th November, 1957 to enable him to explain his prolonged absence, and the issuance of this notice should be deemed to be a substantial compliance with the basic rule of natural justice which underlies Article 311(2).

10. As against the above, it is urged by Shri D. N. Mukherjee, the learned counsel for the respondent that the High Court has rightly struck down F.R. 18 as unconstitutional because the so called "cessation" of service under that Rule is nothing but "dismissal" or "removal" from service within the purview of Article 311(2). It is contended that the termination in question does visit the employee with serious penal consequences. It is pointed out that according to the appellant State, itself, the five years' period of absence from duty which attracted F.R. 18, under which the impugned action has been taken, ended only on 5th September, 1961, and no notice whatever after the completion of the alleged period was issued to the respondent. In these circumstances, says the Counsel, any notices issued to the respondent many years before 5th September, 1961, could not by any stretch of imagination be said to be an observance of the fundamental principle of natural justice enshrined in Article 311(2). In support of his contentions, the learned counsel has referred to Jai Shankar v. State of Rajasthan ((1966) 1 SCR 825 : AIR 1966 SC 492 : (1966) 2 Lab LJ 140) and N. Krishna Madiwala v. Inspector of Post Offices ((1968) 2 Mys LJ 426).

11. The impugned order, dated 15th February, 1963, is in these terms :

> Whereas Shri A. K. Deb, Office Assistant, Office of the Director of Animal Husbandry and Veterinary, Assam, Gauhati, has been absent continuously for more than 5 (five) years from duty without leave;
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> Now therefore, pursuant to F.R. 18 of F.R. and S.R. it is hereby ordered and declared that said Shri A. K. Deb has ceased to be in Government employ with effect from 5th September, 1961.

12. The material part of F.R. 18, runs thus :

> 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.

13. From a reading of F.R. 18 is it discernible 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 employees, as a fault or blameworthy behaviour which renders him unfit to 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.

14. Now in the case in hand, the impugned order was made against the consent of the respondent who has throughout been willing to continue in service. His case is that after the expiry of his leave

he reported for duty and produced a medical certificate of his fitness, but he was arbitrarily and maliciously not allowed to work after 13th September, 1956. Indeed, his contention is that in these circumstances, F.R. 18 would not be attracted. Apart from the constitutional requirement of Article 311(2) natural justice and fairplay required that he should have been given a chance to substantiate his contention. The fact remains that given an opportunity, he would have controverted seriously the circumstances of his absence from duty on the basis of which the impugned action has been taken.

15. It is difficult to accept the contention that the 'removal' under F.R. 18 does not visit the employee with any evil consequences. True, that 'removal' unlike 'dismissal', may not under the Service Rules disqualify the person 'removed' from re-employment under the Government. Further, from the standpoint of the service rules there may be a difference between 'removal' and 'dismissal' as to the extent of consequences that respectively flow therefrom. But for the purpose Article 311(2) both stand on an equal footing, as major penalties. Both entail penal consequences. Not is it correct to say that the removal under F.R. 18 is analogous to compulsory or premature retirement. Out attention has not been drawn to any service rule or provision to support the contention that the impugned order will not result in forfeiture of the benefits already earned by the employees. On the other hand, according to most Service Rules, 'removal' or 'dismissal' does cause forfeiture of the right to pay, allowances and pension already acquired for past services.

16. The distinction between 'removal' and 'compulsory retirement' was pointed out by this Court in Shyamlal v. The State of U. P. ((1955) 1 SCR 26 : AIR 1954 SC 369) thus :

> .... There can be no doubt that removal .... generally implies that the officer is regarded as in some manner blameworthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the levelling or some imputation or charge against the officer which may conceivably be controverted or explained by the officer. There is no such element of charge or imputation in the case of compulsory retirement ..... compulsory retirement has no stigma or implication of misbehaviour or incapacity.
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> # * * *##
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> ..... dismissal or removal is a punishment. This is imposed on an officer as penalty. It involves loss of benefit already earned.
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> # * * *##
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> ..... an officer who is compulsory retired does not lose any part of the benefit that he has earned.

17. Even if it is assumed that termination under F.R. 18 does not cause forfeiture of benefits already earned such as pension, etc., then also that will not, by itself, take it out of the category of 'removal' as envisaged by Article 311(2). The respondent was a permanent government servant. He had a right to his substantive rank. According to the test laid down by this Court in Parshotam Lal Dhingra's case (1958 SCR 828 : AIR 1958 SC 36 : (1958) 1 Lab LJ 544) the mere termination of service, without more, of such an employee would constitute his 'removal' or 'dismissal' from service, attracting Article 311(2). From the constitutional standpoint, therefore, the impugned termination of

service will not cease to be 'removal' from service merely because it is described or declared in the phraseology of F.R. 18 as a cessation of service. The constitutional protection guaranteed by Article 311(2) cannot be taken away "in this manner by a side wind".

18. The above view is fortified by the ratio of this Court's decision is Jai Shanker v. State of Rajasthan (supra). The appellant therein was Head Warder in the permanent service of Rajasthan State. On 14th April, 1950, he proceeded on two month's leave. He later asked for extensions of the leave on medical grounds. He was due to join on 13th August, 1950 : his request beyond that date was refused. Thereafter he made further applications for leave, the last of them supported by a medical certificate. To his last and some of the earlier applications he received no reply, but on 8th November, 1950, he received a communication from the Deputy Inspector General of Prisons that he was discharged from service from 13th August, 1950. Departmental remedies having failed, he field a suit challenging his removal from service. The trial Court dismissed his suit. The first appellate Court accepted his appeal. In second appeal the State, the High Court restored the trial Court's order. The employee came to this Court in appeal by special leave. The State relied on Regulation 13 of the Jodhpur Service Regulations which provided :

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

19. It was contended that the State that this regulation operated automatically and no question of removal from service could arise because the servant must be considered to have sacrificed his appointment. It was maintained that under the Regulation, the employee could only be reinstated with the sanction of the competent authority.

20. As before us in the instant case, the question that fell for consideration was, whether the Regulation was sufficient to enable the Government to remove a person from service without giving him an opportunity of showing cause against that punishment, if any. Answering this question in the negative, the Court, speaking through Hidayatullah, J. (as he then was) illumined the position thus :

> The Regulation no doubt, speaks of reinstatement if (the employee) is 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 over- staying 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 only be reinstated by an appropriate authority, that the removal is automatic and outside 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.

21. The above enunciation applies to the facts of the present case. Excepting the length of the period of absence, the basic features of Registration 13 in Jai Shankar's case (supra) were very similar to those of F.R. 18 now under consideration. The words "should be considered to have sacrificed his appointment" in Regulation 13, substantially correspond to the words "servant ceases to be in Government employ" in F.R. 18. Further the impost and effect of the phrase "may only be reinstated with the sanction of the competent authority" in the Regulation, is largely the same as that of the opening clause "unless the provincial Government in view of the special circumstances of the case shall otherwise determine" in F.R. 18. The difference between the Regulation and F.R. 18 as to the length of absence from duty prescribed as condition precedent for the attraction the respective provision, is a distinction without a difference in principle. The consequence of absence, through for different periods, envisaged by both the provisions, is the same "sacrifice" or "cessation" of the absentee's service. The present case will thus be governed by the ration of Jai Shankar's case.

22. Recently, in Deokinandan Prasad v. State of Bihar ((1971) 2 SCC 330) a Bench of Five learned Judges of this held that an order of termination of service passed under Rule 76, Bihar Service Code (which is identical in all respects with F.R. 18 in the present case) on account of the servant's continuous absence for 5 years without giving an opportunity to the servant under Article 311(2) would be invalid.

23. In the light of the above decisions, there can be no escape from the conclusion, that the impugned order; dated 13th February, 1963 was violative of Article 311(2) of the Constitution and, as such illegal. It was imperatively necessary to give the servant an opportunity to show-cause against the proposed action, particularly when he was persistently contending that his failure to join duty or absence was involuntary and due to circumstances beyond his control.

24. In view of the above approach, it is not thought necessary to express any final opinion as to the Constitutional validity of Rule 18 of Assam Fundamental and Subsidiary Rules. Although couched in ambiguous and unhappy language, the Rule is capable of being interpreted and worked consistently with the requirement of Article 311(2) of the Constitution. This, however, should not lull the Government into a sense of complacency and belief that all is well with the Rule. The sooner it is suitably amended, the better will it be in the interest of all concerned.

25. For the foregoing reasons, the appeal fails and is dismissed with costs.

GUPTA, J. (concurring) –

I agree that the respondent should have been given an opportunity to show cause against the termination of his service by the application of Rule 18 of the Assam Fundamental and Subsidiary Rules. This rule, so far as it is relevant for the present purpose, provides that after five years' continuous absence from duty, whether with or without leave, a government servant ceases to be in government employ unless in the special circumstances of a case the State Government determines

otherwise. The impugned order declares that the respondent had ceased to be in government employ with effect from September 5, 1961. One of the allegations made by the respondent is that he did not absent himself from duty, but "was not allowed to work in the office after September 13, 1956." The respondent claims, inter alia, that on the facts of his case Fundamental Rule 18 was not attracted. It is not suggested by the appellants that the respondent should be deemed to have been absent from duty even for the period he was prevented from joining his office his allegation was true. It was necessary therefore to give him a chance to prove the facts alleged by him which made Fundamental Rule 18 inapplicable to his case. This is a requirement of natural justice, and this was not complied with. I prefer resting my decision on this ground only. On the arguments advanced before us, I find it difficult to express a definite opinion that termination of service it terms of Fundamental Rule 18 amounts to removal. That rule embodies a condition of service and I do not see how the termination of service of a government employee in terms of a rule regulating his conditions of service is removal within the meaning of Article 311 of the Constitution unless the termination is by way of penalty. It was not claimed that termination of service under Rule 18 entails loss of benefit already accrued or any other penal consequences. I do not find it possible to assume such penal consequences to construe a notice of termination under this rule as removal.

27. In Jai Shanker v. State of Rajasthan (supra), this Court construing Regulation 13 of Jodhpur Service Regulations which is somewhat similar to and also different in some respects from Rule 18 of Assam Fundamental Rules held that the regulation involved a punishment for overstaying one's leave, no matter how the regulation described it, that an opportunity must therefore be given to the person against whom an order under the regulation was proposed, and that to give to opportunity was to go against Article 311. I do not however read Jai Shanker's case (supra) as laying down any general principle as to how service rules are to be interpreted. Rule 76 of Bihar Service Code, which is word for word almost the same as Rule 18 of Assam Fundamental Rules came to be considered by this Court in Deokinandan Prasad v. State of Bihar (supra) in that case it appears to have been admitted on behalf of the State of Bihar that continuous absence from duty for over five years, apart from resulting in the forfeiture of the office also amounts to misconduct under Rule 46 of Bihar Pension Rules. In the case before us, we were not addressed on this aspect by Counsel on either side, and in the absence of relevant material, I do not feel inclined to express any opinion on the point.

28. I agree with my learned brother that the appeal should be dismissed with costs.

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