

Union of India and Others

Vs

J. Ahmed

Civil Appeal No. 2152 of 1969

(D. A. Desai, O. Chinnappa Reddy JJ)

07.03.1979

JUDGMENT

DESAI, J. -

1. Respondent J. Ahmed joined service in Assam State in 1945 and some time in 1959 came to be promoted to the Indian Administrative Service Cadre. In that very year he was posted as Deputy Commissioner and District Magistrate, Nowgong District. While he was holding the aforementioned post, some time in the beginning of June 1960 there were large scale disturbances in Nowgong city and District area described in official parlance as 'language disturbances'. There was considerable damage to property. One Shri A. N. Kidwai, the then Additional Chief Secretary to the Government of Assam, undertook an inquiry into the causes of disturbances at Nowgong with a view to ascertaining the responsibility of District officials. After Shri Kidwai submitted his Report, the Government took the first step of suspending the respondent from service by an order dated September 14, 1960. The Chief Secretary to the Government of Assam by his communication dated September 13, 1960 conveyed to the respondent various charges framed against him and called upon him to submit his explanation. A statement of allegations was annexed to the communication. Respondent submitted his explanation and thereafter the Government appointed respondent 4, K. Balachandran as the Enquiry Officer. After the inquiry was concluded, the Enquiry Officer submitted his report. It may be noticed that respondent was born on February 1, 1907 and according to Rule 16 of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 ('Retirement Rules' for short), then in force, the age of retirement being 55 years, the respondent would have retired from service on February 1, 1962. First, the Governor of Assam by his order dated January 31, 1962 purporting to exercise power under Rule 16(1) of the Retirement Rules, directed that the respondent then under suspension be retained in service for a period of three months beyond the date of his retirement which fell on February 1, 1962 or till the termination of departmental proceedings drawn up against him, whichever is earlier. By subsequent orders dated June 21, 1962, September 1, 1962, February 23, 1963 and August 28, 1963 respondent was retained in service, till the inquiry pending against him concluded and final orders were passed in the proceedings. It may be mentioned that the order dated August 28, 1963 was made by the Governor in exercise of the powers conferred by sub-rule (2) of Rule 16 of the Retirement Rules. The Enquiry Officer submitted his report holding charges 1, 2, 3, 5 and 6 proved and in respect of charge 4 the finding recorded was that though the charge was proved, the Enquiry Officer took note of certain extenuating circumstances mentioned in the report. A Memorandum dated February 22, 1963 was served by the Government of India on the respondent forwarding the report of the Enquiry Officer and the respondent was called upon to show cause why the provisional penalty determined by the Government of removal from service be not imposed upon him. Ultimately, by order dated October 11, 1963 the President, after consultation with the Union Public Service Commission, imposed the

penalty of removal from service on the respondent. A memorial submitted by the respondent to the President under Rule 20 of the All India Services (Discipline & Appeal) Rules, 1955, ('Discipline and Appeal Rules' for short), against the imposition of the penalty was rejected.

2. The respondent filed a petition under Article 226 of the Constitution in the High Court of Assam and Nagaland. Two contentions were raised before the High Court : (1) Whether Rule 16(2) of the Retirement Rules is attracted so as to retain the respondent in service beyond the period of his normal retirement for the purpose of completing disciplinary proceedings against the respondent; and (2) if Rule 16(2) was not attracted, whether the retention of respondent beyond the normal period of his retirement was valid and if it was not valid, whether he could be removed from service after he had actually and effectively retired from service ? While examining these two contentions, the High Court was of the opinion that disciplinary proceedings can be held and punishment can be imposed for misconduct and the charges *ex facie* did not disclose any misconduct because negligence in performance of duty or inefficiency in discharge of duty would not constitute misconduct. On the second point it was held that if the Enquiry was not for any misconduct, sub-rule (2) of Rule 16 would not be attracted and the Government had no power to retain the respondent in service for the purpose of holding or completing disciplinary proceeding which can only be for misconduct, and as there was no inquiry into what can be styled as misconduct, the retention in service of the respondent beyond the period of retirement was not legal and valid, and, therefore, the respondent could not be removed from service from which he had retired. In accordance with these findings, the writ petition filed by the respondent was allowed declaring that the respondent was deemed to have retired from service from February 1, 1962 and that the punitive or disciplinary action taken against him after that date is completely without jurisdiction and wholly unjustified, and the same was quashed.

3. The Union of India and the State of Assam have preferred this appeal by special leave.

4. Rule 3 of the Discipline and Appeal Rules provides that the penalties therein set out may, for good and sufficient reasons, be imposed on a member of service. One such penalty prescribed therein is 'removal from service which shall not disqualify for future employment'. Rule 4 prescribes the authority competent to institute disciplinary proceedings. Where a member of a service has committed any act or omission which renders him liable to any penalty specified in Rule 3, an inquiry shall be held according to procedure prescribed in Rule 5. Therefore, penalty prescribed in Rule 3 can be imposed upon a member of the service for any act or omission committed by him which, according to Rule 3, must provide good and sufficient reason to impose one or the other of the penalties mentioned therein. Rule 7 of the Discipline and Appeal Rules enables the Government to put under suspension a member of the Service during disciplinary proceeding if having regard to the nature of charges and circumstances the Government thinks it proper to do so. Sub-rule (2) of Rule 16 of the Retirement Rules as it stood at the relevant time reads as under :

16(2). A member of the service under suspension on a charge of misconduct shall not be required or permitted to retire from the service but shall be retained in service until the inquiry into the charges against him is concluded and a final order is passed.

5. A survey of these rules would show that disciplinary proceeding can be held against a member of the service for any act or omission which renders him liable to a penalty and such penalty can be imposed for good and sufficient reasons. All India Services (Conduct) Rules, 1954, prescribe a code of conduct for members of service. Discipline and Appeal Rules provide for disciplinary action and imposition of penalties. Sub-rule (2) of Rule 16 of the Retirement Rules contemplates a situation

where a member of service against whom disciplinary proceeding is pending is likely to retire and the proceedings may be thwarted and provides for his retention in service beyond the date of his retirement till the completion of the inquiry, provided the delinquent officer is under suspension on a charge of misconduct.

6. The respondent contended and the contention has found favour with the High Court that the charges framed against the respondent, even if they are held proved, would not constitute misconduct, and, therefore, it could not be said that he was under suspension of a charge of misconduct and accordingly sub-rule (2) of Rule 16 would not be attracted and he could not be retained in service beyond the date of his retirement. It was said that retention in service being invalid, imposition of penalty after his retirement is illegal. Therefore, what constitutes misconduct for a member of a service liable to be removed from service on proof of such misconduct in a disciplinary proceeding, looms large in this case.

7. To appreciate the contention it is better to have a look at the charges framed against the respondent. They are as under :

(i) Completely failed to take any effective preventive measures against widespread disturbances breaking out in Nowgong District in spite of adequate warning being conveyed;

(ii) Showed complete lack of leadership when the disturbances actually did break out and failed to give proper direction to your subordinate Magistrates and co-ordinate co-operations with the police to restore law and order;

(iii) Did not personally visit the scenes of disturbances within the town or in the rural areas, in time to take personal control of the situation and to exercise necessary supervision;

(iv) Did not keep Government informed of the actual picture and extent of the disturbances;

(v) Showed complete ineptitude, ineptitude, lack of foresight, lack of firmness and capacity to take quick and firm decision and were, thus largely responsible for complete breakdown of Law and Order in Nowgong town as well as the rural areas of Nowgong District.

Thus you proved yourself completely unfit to hold any responsible position.

8. The Inquiry Officer has treated the statement in the letter conveying the charges that the respondent proved himself completely unfit to hold a responsible position as a separate and independent charge which on the face of it is merely a surmise or a conclusion drawn from the five charges set out above. This surmise or conclusion has to be ignored and cannot be treated as a specific charge.

9. The five charges listed above at a glance would convey the impression that the respondent was not a very efficient officer. Some negligence is being attributed to him and some lack of qualities expected of an officer of the rank of Deputy Commissioner are listed as charges. To wit, charge 2 refers to the quality of lack of leadership and charge 5 enumerates ineptitude, lack of foresight, lack of firmness and indecisiveness. These are qualities undoubtedly expected of a superior officer and

they may be very relevant while considering whether a person should be promoted to the higher post or not or having been promoted, whether he should be retained in the higher post or not, or they may be relevant for deciding the competence of the person to hold the post, but they cannot be elevated to the level of acts of omission or commission as contemplated by Rule 4 of the Discipline and Appeal Rules so as to incur penalty under Rule 3. Competence for the post, capability to hold the same, efficiency requisite for a post, ability to discharge function attached to the post, are things different from some act or omission of the holder of the post which may be styled as misconduct so as to incur the penalty under the rules. The words 'acts and omission' contemplated by Rule 4 of the Discipline and Appeal Rules have to be understood in the context of the All India Services (Conduct) Rules, 1954 ('Conduct Rules' for short). The Government has prescribed by Conduct Rules a code of conduct for the members of All India Services. Rule 3 is of a general nature which provides that every member of the service shall at all times maintain absolute integrity and devotion to duty. Lack of integrity, if proved, would undoubtedly entail penalty. Failure to come up to the highest expectations of an officer holding responsible post or lack of aptitude or qualities of leadership would not constitute as failure to maintain devotion to duty. The expression 'devotion to duty' appears to have been used as something opposed to indifference to duty or easy-going or light-hearted approach to duty. If Rule 3 were the only rule in the Conduct Rules it would have been rather difficult to ascertain what constitutes misconduct in a given situation. But Rules 4 to 18 of the Conduct Rules prescribe code of conduct for members of service and it can be safely stated that an act or omission contrary to or in breach of prescribed rules of conduct would constitute misconduct for disciplinary proceedings. This code of conduct being not exhaustive it would not be prudent to say that only that act or omission would constitute misconduct for the purpose of Discipline and Appeal Rules which is contrary to the various provisions in the Conduct Rules. The inhibitions in the Conduct Rules clearly provide that an act or omission contrary thereto so as to run counter to the expected code of conduct would certainly constitute misconduct. Some other act or omission may as well constitute misconduct. Allegations in the various charges do not specify any act or omission in derogation of or contrary to Conduct Rules save the general Rule 3 prescribing devotion to duty. It is, however, difficult to believe that lack of efficiency, failure to attain the highest standard of administrative ability while holding a high post would themselves constitute misconduct. If it is so, every officer rated average would be guilty of misconduct. Charges in this case as stated earlier clearly indicate lack of efficiency, lack of foresight and indecisiveness as serious lapses on the part of the respondent. These deficiencies in personal character or personal ability would not constitute misconduct for the purpose of disciplinary proceedings.

10. It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

11. Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct (see *Pierce v. Foster* (17 Q B 536, 542)). A disregard of an essential condition of the contract of service may constitute misconduct [see *Laws v. London Chronicle (Indicator Newspapers)* ((1959) 1 WLR 698)]. This view was adopted in *Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur* (61 Bom LR 1596), and *Satubha K. Vaghela v. Moosa Raza* (10 Guj LR 23). The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under :

Misconduct means, misconduct arising from ill motive; acts of negligence, errors of

judgment, or innocent mistake, do not constitute such misconduct.

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik* ((1966) 2 SCR 434 : AIR 1966 SC 1051 : (1966) 1 LLJ 398 : 28 FJR 131), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In *S. Govinda Menon v. Union of India* ((1967) 2 SCR 566 AIR 1967 SC 1274 : (1967) 2 LLJ 249), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in *P. H. Kalyani v. Air France, Calcutta* ((1964) 2 SCR 104 : AIR 1963 SC 1756 : (1963) 1 LLJ 679 : 24 FJR 464), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that the degree of culpability would be very high. An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationery train causing head-on collision; a nurse giving intravenous injection which ought to be given intra muscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil (see *Navinchandra Shakerchand Shah v. Manager, Ahmedabad Co-op. Department Stores Ltd.* ((1978) 19 Guj LR 108, 120)) But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty.

12. The High Court was of the opinion that misconduct in the context of disciplinary proceeding means misbehaviour involving some form of guilty mind or mens rea. We find it difficult to subscribe to this view because gross or habitual negligence in performance of duty may not involve mens rea but may still constitute misconduct for disciplinary proceedings.

13. Having cleared the ground of what would constitute misconduct for the purpose of disciplinary proceeding, a look at the charges framed against the respondent would affirmatively show that the charge inter alia alleged failure to take any effective preventive measures meaning thereby error in judgment in evaluating developing situation. Similarly, failure to visit the scenes of disturbance is another failure to perform the duty in a certain manner. Charges 2 and 5 clearly indicate the shortcomings in the personal capacity or degree of efficiency of the respondent. It is alleged that respondent showed complete lack of leadership when disturbances broke out and he disclosed complete ineptitude, lack of foresight, lack of firmness and capacity to take firm decision. These are personal qualities which a man holding a post of Deputy Commissioner would be expected to

possess. They may be relevant considerations on the question of retaining him in the post or for promotion, but such lack of personal quality cannot constitute misconduct for the purpose of disciplinary proceedings. In fact, charges 2, 3 and 6 are clear surmises on account of the failure of the respondent to take effective preventive measures to arrest or to nip in the bud the ensuing disturbances. We do not take any notice of charge 4 because even the Enquiry Officer has noted that there are number of extenuating circumstances which may exonerate the respondent in respect of that charge. What was styled as charge 6 is the conclusion, viz., because of what transpired in the inquiry, the Enquiry Officer was of the view that the respondent was unfit to hold any responsible position. Somehow or other, the Enquiry Officer completely failed to take note of what was alleged in charges 2, 5 and 6 which was neither misconduct nor even negligence but conclusions about the absence or lack of personal qualities in the respondent. It would thus transpire that the allegations made against the respondent may indicate that he is not fit to hold the post of Deputy Commissioner and that if it was possible he may be reverted or he may be compulsorily retired, not by way of punishment. But when the respondent is sought to be removed as a disciplinary measure and by way of penalty, there should have been clear case of misconduct, viz., such acts and omissions which would render him liable for any of the punishments set out in Rule 3 of the Discipline and Appeal Rules, 1955. No such case has been made out.

14. Mr. Naunit Lal for the appellant contended that the word 'misconduct' is nowhere used either in the Conduct Rules or in the Discipline and Appeal Rules and the Court should not import any concept of misconduct in this inquiry. The word 'misconduct' has relevance here because the respondent in due course would have retired from service on February 1, 1962 on attaining the age of 55 years. The inquiry could not be completed before the relevant date and it became necessary for the Government to retain the respondent in service beyond the normal period of retirement on superannuation for continuing the inquiry. Rule 16(1) of the Retirement Rules, 1955 as it stood at the relevant time provided for retirement on superannuation on attaining the age of 55 years. There is a proviso to Rule 16(1) which enables the State Government to postpone the period of retirement and retain the Government servant in service for an aggregate period not exceeding six months and if the retention in service beyond that period is required, the same will have to be with the sanction of the Central Government.

15. Respondent would have retired from service on attaining the age of 55 years on February 1, 1962. He was served with a charge-sheet dated September 13, 1960. The inquiry could not be completed before the date of retirement of the respondent. The Government of Assam by order dated January 31, 1962 retained the respondent in service for a period of three months beyond the date of his retirement which fell on February 1, 1962 or till the termination of the departmental proceedings drawn up against him whichever is earlier. In view of the language of Rule 16(1), the Assam Government had no power to extend the period of service of a member of the service beyond a period of six months in the aggregate. Therefore, retention for a period of three months would be legal and valid with the result that the date of retirement of the respondent would be postponed to May 1, 1962. Admittedly no order was made by the Assam Government before May 1, 1962. The order postponing the date of retirement and retention of the respondent in service beyond May 1, 1962 was made on June 21, 1962. No order was made by the Assam Government for postponing the period of retirement of the respondent and his retention in service before May 1, 1962. The State Government had power under Rule 16 (1)(a) of the Retirement Rules to retain the respondent in service for a period of six months in aggregate and therefore, even though specific period was mentioned in the order, simultaneously providing for retention in service till the date of termination of the proceedings, the extension would be valid for a period of six months in the aggregate if the inquiry was continuing till the expiration of six months but not exceeding six months. In that event

the respondent would retire from service by August 1, 1962. Putting the construction on Rule 16(1)(a) and the order of extension, most favourable to the State Government, it may be stated at once that retention in service up to August 1, 1962 would be valid but unfortunately the inquiry was not over by August 1, 1962. No order was made before August 1, 1962 for retention of the respondent in service beyond August 1, 1962. The order next in succession is of September 1, 1962. This order is again made by the State of Assam. The State Government had no power to retain a member of the service for a period exceeding six months in the aggregate after the date of his normal retirement. The maximum period for which retention could be ordered by the State Government being thus six months, the respondent would have retired from service on August 1, 1962. Even if an order had been made by the State Government to retain the respondent in service it would be without jurisdiction and the order in fact was made on September 1, 1962. Now, undoubtedly under Rule 16(1)(b) the Central Government has power to retain a member of the service in service after the date of retirement for any period beyond six months. But in this connection it may be pointed out that no such order appears to have been made by the Central Government. All the subsequent orders were made by the Government of Assam. Such orders made by the Government of Assam would not have the effect of retaining the respondent in service beyond a period of six months from the date of his normal retirement. That being the maximum period, the State Government had no power to retain the respondent in service. If the State Government could not retain him in service beyond August 1, 1962, it could not continue the inquiry thereafter. This position seems to be clearly established by the decision of this Court in *State of Assam v. Padma Ram Borah* (AIR 1965 SC 473 : ILR (1963) 15 Assam 97). In that case the State Government had made an order to retain the Government servant in service up to the end of March 31, 1961. Subsequent order extending the period was made on May 9, 1961. This Court held that according to the earlier order of the State Government itself the service of the Government servant had come to an end on March 31, 1961 and the State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961. It is thus clear that the retention of the respondent in service by order of the State Government not made before the retirement taking place on August 1, 1962 and the State Government not having the power to retain the respondent, a member of the Indian Administrative Service, beyond a period of six months, the respondent could not be said to have continued in service so that an inquiry could be continued against him.

16. Mr. Naunit Lal, however, contended that sub-rule (2) of Rule 16 clearly provides that a member of the service under suspension on a charge of misconduct shall not be required or permitted to retire from the service until the enquiry into the charges against him is concluded and a final order is passed. It is in the context of sub-rule (2) of Rule 16 that the question of the nature of the proceedings held against the respondent assumed importance. If the inquiry was on a charge of misconduct, the respondent could be retained in service until the inquiry into the charges against him was concluded and a final order was made. But before sub-rule (2) of Rule 16 would be attracted it must be shown that the member of the service was under suspension on a charge of misconduct and an inquiry was being conducted against him. As pointed out earlier, on misconduct as one would understand that word in the context of disciplinary proceeding was alleged against the respondent. There was an inquiry but before sub-rule (2) of Rule 16 is attracted, it had to be an inquiry on a charge of misconduct. What is alleged is not misconduct as the word is understood in service jurisprudence in the context of disciplinary proceedings. Therefore, it could not be said that an inquiry on a charge of misconduct was being held against the respondent and sub-rule (2) of Rule 16 would thus be attracted and he would be deemed to have been retained in service till the inquiry

was concluded.

17. It thus appears crystal clear that there was no case stricto sensu for a disciplinary proceeding against the respondent. In fact the inquiry was held to establish that the respondent was not fit to hold a responsible post. The respondent was actually retiring from service and there was no question of his any more holding a responsible position. Yet not only the inquiry was initiated but he was retained in service beyond the date of his normal retirement till the final order was made on October 11, 1963 when he was removed from the Indian Administrative Service. It appear that there were large scale disturbances in the State. There followed the usual search for a scapegoat and the respondent came handy. Some charges were framed none of which could constitute misconduct in law. Some charges were mere surmises. Substance of the allegations was that he was not a very efficient officer and lacked the quality of leadership and was deficient in the faculty of decision making. These deficiencies in capacity would not constitute misconduct. If the respondent were a young man and was to continue in the post for a long period, such an inquiry may be made whether he should be retained in the responsible post. He may or may not be retained but to retain him in service beyond the period of his normal retirement with a view to punishing him was wholly unjustified. The High Court was, therefore, right in coming to the conclusion that the respondent was no longer in service on the date on which an order removing him from service was made and, therefore, the order was illegal and void.

18. Accordingly, this appeal fails and is dismissed with costs.

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