ALLAHABAD HIGH COURT

Balwant Raj

Vs.

Union of India

Second Appeal No. 1297 of 1961. against decree of Civil J. Roorkee at Sabarnnpur
(S.S. Dhavan, J.)

06.12.1960. 01.12.1966

JUDGMENT

S.S. Dhavan, J.

1. This is an appeal by a Railway employee from the decree of the Civil Judge Roorki (at Saharanpur) affirming that of the City Munsif Saharanpur dismissing his suit for a declaration that he continues to be in the service of the Union of India. It is an important case because it reveals that some departments of Government have not yet realized that in making applying, and interpreting rules governing the conditions of service of their employees it is the duty of State to apply the directive principles of State policy in Part IV of the Constitution. The admitted facts are these the appellant Balwant Raj was employed by the Northern Railway on 8th August 1950 and appointed as a Painter-Khalasi under the Head Trains Examiner Saharanpur Within three years he was drawing Rs. 75 as salary and allowances. It is common ground that he was never guilty of any misconduct or misbehavior. On 30th March 1953 he had the misfortune to be stricken with tuberculosis He reported sick and was admitted in the Railway Hospital at Saharanpur He remained on the sick list for three years and was discharged on 25th January 1956 under the orders of the Divisional Medical Officer Delhi (to be called the D.M.O.) who pronounced him fit for service and directed that he be sent back on duty. The Railway hospital authorities issued him a certificate of fitness, and on the same date the appellant reported for duty to his superior officer the Head Trains Examiner Saharanpur. The latter however informed him that during his illness the entire staff of the section to which the plaintiff belonged had been transferred to Kalka and directed him to report for duty at Kalka giving him

three days' joining time on 30th January, 1956, the appellant reported for duly to the Works Manager. Kalka Workshop, who however directed him to report to the Works Manager, Jagadhari Workshop. Accordingly on 23rd February, 1956 the appellant reported himself for duty to the Works Manager Jagadhari. The appellant's case is that he attended the office of the Works Manager Jagadhari from 2nd till the 8th February 1956 when that officer directed him to obtain fresh orders Accordingly the appellant reported on duty to the Head Trains Examiner Saharanpur on 9th February 1956. The latter officer directed him to obtain fresh orders from the Divisional Personnel Officer Northern Railway Delhi (to be called D.P.O.) and issued a Third Class Duty Pass to enable the appellant to travel to Delhi. The appellant reported on duty to the D.P.O. Delhi on the next day the 10th February, 1956, and attended the office regularly till the 23rd June but no orders were issued to enable him to resume work. The Railway authorities refused to take him back in service and he was informed that his services had automatically terminated under Rule 731(1). Note 3 of the Railway Establishment Code because he had remained absent from duty for a period longer than he was entitled to do under the rules. Thereupon the appellant after serving a notice on the Railway under Section 80 C.P.C filed the present suit for a declaration that he continues to be in service. The Railway resisted the suit and filed a written statement In it the material facts alleged in the plaint were conceded it was admitted that the appellant had fallen ill and had to be treated for tuberculosis in the Railway Hospital it was also admitted that he was discharged as fit for duty on 25-1-1956. The Railway made no allegations of misconduct or improper behavior on the part of the appellant But it relied on a certain rule in the Railway Establishment Code which, according to them, provides for automatic termination of the service of a Railway employee if he falls to resume duty on the expiry of the maximum period of leave due to him. According to the Railway the leave at the credit of the appellant when he fell ill was 8 days on average pay 15 days on half average pay, and one and a half years without pay. The maximum period of leave to which the appellant was entitled expired on 20th October 1954. The case of the Railway is that as the appellant continued to remain sick after this date and failed to report on duty his services must be deemed to have automatically terminated under the rules mentioned above. The Railway contended that this rule was a part of the conditions of service of the appellant as a temporary employee and the Railway was entitled to consider his services as terminated and refused to take him back in service before the trial court the appellant contended that he was entitled to the protection of Article 311 and as the Railway had not given a reasonable opportunity to show cause before terminating his services, their decision

was void. The trial court rejected this contention on the ground that the appellant being a temporary employee was hound by the rules which formed a part of the conditions of his service. It dismissed the suit. This decision was affirmed by the lower appellate court which, relying on Rule 731(1), Note 3, of the Railway Establishment Code held that the appellant's services were automatically terminated after he had remained absent beyond the period of leave to which he was entitled under the rules. The appellant has come here in second appeal.

2. Mr. V.S. Saxena learned counsel for the appellant argued that the view of the court below that Article 311 does not apply to the appellant's case is erroneous. He relied on two decisions of the Supreme Court. The first is *Champaklal Chiman Lal Shah v. Union of India.* [1] in which the court affirmed the principle laid down in the earlier case of *Parshottam Lal Dhingra v. Union of India,* [2] that a temporary servant is entitled to the protection of Article 311. The other is *Jai Shankar v. State of Rajasthan,* [3] in which it was held that the State cannot deprive an employee of his right to remain in service and to the constitutional protection of Article 311 by making a rule to the effect that an official who absents himself without permission or remains absent at the end of his leave shall be considered to have sacrificed his appointment. In that case one Jai Shankar, a Head Warder of the Central Jail, Jodhpur, fell ill and took leave for two months. He applied for several extensions of leave and was due to join on August 13, 1950. He again applied for leave but it was refused and he was told that no more leave would be granted. He did not report on duty but made several applications for further leave which were supported by a Medical Certificate. He received no replies to his applications, and on 8th November, 1950, he was informed that he has been discharged from service with effect from 13th August, 1950, that is from the date on which he was due to join but did not. He then filed a suit for a declaration that his removal from service was illegal and that he continued to remain in employment. He contended that he was entitled to the benefit of Article 311(2) and to an opportunity to show cause against his removal. The State relied on Regulation 13 of the Jodhpur Service Regulations which is as follows :

> "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 competent authority."

The trial court dismissed the suit but the district court allowed it, but its decision in turn was set aside by the High Court. The Supreme Court, reversing the decision of the High Court, held that where a person is entitled to continue in service, his removal amounts to punishment and he must be given an opportunity to show cause against the action proposed and that this constitutional protection cannot be taken away. I am afraid Article 311 does not help the appellant. In Jai Shanker's case, AIR 1966 Supreme Court 492 the employee was permanent servant and entitled as a right to remain in service. But the appellant is a temporary employee bound by the conditions of his service.

3. But in my opinion the appellant must succeed on a ground which was overlooked by the courts below. It is common ground that the Railway authorizes did not discharge the appellant from service. Learned counsel for the Railway conceded that no formal order of discharge was passed. The conduct of the Railway also shows that no such order was passed. When the appellant reported for duty at Saharanpur he was asked to go to Kalka and was given a duty pass to enable him to go there. When he went to Kalka he was asked to report to Jagadhari and again given a pass, and when he reported to Jagadhari he was asked to go to Delhi and again given a pass. It is elementary that a duty pass, as the very name implies can only be given to an employee who is travelling on duty and no employee can travel on a duty pass unless he is in service. In their written statement too the Railway have not relied on any formal order of discharge.

4. But their contention is that the services of the appellant must be deemed to have been automatically terminated under Note 8 to Rule 731(1) of the Railway Establishment Code and there was no option for the Railway but to enforce the rule. As this rule is the foundation of the case of the Railway I have to interpret it. It runs thus :

> "Where a temporary Railway servant fails to resume duty on the expiry of the maximum period of extraordinary leave granted to him or where he is granted a lesser amount of extraordinary leave than the maximum amount admissible, and remains absent from duty for any period which together with the extraordinary leave granted exceeds the limits up to which he could have been granted such leave under clause (1) above, he shall be deemed to have resigned his appointment and shall accordingly cease to be in Railway employ."

5. It is common ground that the plaintiff's illness lasted for a period longer than the maximum period of leave which was due to him and consequently he could not report for duty on the expiry of this period. But in my opinion the words "fails to resume duty" apply only to a railway servant who by a voluntary and deliberate act or omission stays away from duty and fails to report and not to one who was prevented by a cause beyond his control to resume duty. It cannot apply to a servant who fell ill and was treated by the Railway in its own hospital under its own supervision, and was discharged as fit for duty by its own officers after the expiry of the maximum period of leave due to him.

6. Learned counsel for the Railway argued that the words "fails to resume duty" should be given then literal meaning which will include failure for any cause whatsoever irrespective of whether the servant was to blame or not I cannot agree for several reasons. First, where two interpretations of a rule are possible, the court should accept the one which is consistent with equity, justice, and good conscience and reject the one which will make rule oppressive Secondly as the enforcement of this rule may deprive a railway employee of his means of livelihood by the automatic termination of his services under certain circumstances, the word "fails to resume duty" should be strictly interpreted and limited to a voluntary and deliberate act or omission resulting in failure to resume duty. Thirdly, and this is the most important reason of all, the rule must be interpreted in accordance with letter and spirit of the Directive Principles of State Police proclaimed by the constitution. Article 41 of the Constitution provides :

> "Article 41.The State shall, within the limits of its economic capacity and development, make effective provisions for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

The rights enshrined in the directive principles are not justifiable but these principles have been made "fundamental in the governance of the country" under Article 37 which provides, that it shall be the duty of the State to apply them in making laws. The phrase "making of laws" is wide enough to include their interpretation and therefore the courts must interpret the laws, in the 'light of the Directive Principles' Now. Article 41 commands the State to make effective provision, within the limits of its economic capacity and development, for securing inter alia two rights (1) the right

to work and (2) the right to public assistance in cases of unemployment, old age, disablement and sickness I am of the view that Rule 731(1). Note 3 should be interpreted in the light of Article 41 of the Constitution, and it must be presumed that the rule was not framed with the object of depriving a person of his job if he happens to fall ill and is prevented by illness from reporting back on duty within the period of maximum leave due to him. The alternative interpretation that even a sick man must be deemed to have resigned his job if his period of illness happens to be a long one is not only against the spirit of Article 41 but will make the Railway administration in India one of the most callous-minded employers in the State. The court cannot presume that this rule was framed by the Railway authorities with such a callous intention. In my opinion this rule was intended to penalize only those who can report for duty after the expiry of leave but voluntarily stay away from their job. and not to an employee who is suffering from a long illness which prevents him from resuming his duties within the prescribed period.

7. For these reasons I hold that the appellant's failure to resume duty in 1954 having been caused by his sickness was not voluntary or deliberate and did not result in the automatic termination of his services under Rule 731(1). and he is entitled to a declaration that he continues in service I allow this appeal, set aside the decision of the courts below and decree the appellant's suit with costs throughout. There shall be a declaration that the appellant continues in the service of the Union of India.

Appeal allowed.

Cases Referred.

1. AIR 1964 SC 1854
2. AIR 1958 SC 36
3. AIR 1986 SC 492