CALCUTTA HIGH COURT

Prasadi

Vs.

Works Manager (M) Lillooah

A.F.O.O. No. 191 of 1954

(Chakravartti, C.J. and Lahiri, J.)

01.08.1956

JUDGMENT

Chakravartti, C.J.

1. The two appellants before us used to be blacksmiths employed in the Railway Workshop at Lillooah under the Eastern Railway. On 9-2-1952, a criminal prosecution was launched against them on the allegation that between the hours of 1 a.m. and 3 a.m. in the previous night, they had indulged in gambling, while they should have been attending to their duties. The prosecution, which was under Section 15, Howrah Offences Act, failed, because the learned Magistrate found that the section only punished gambling in the public streets, but not gambling inside any premises. Accordingly, he acquitted them. The Railway Administration, however, thought that the acquittal was only a technical one and that the appellants had been guilty of conduct which called for disciplinary action. They, therefore, started a proceeding.

2. The acquittal was on 17-3-1952. On the 24th of March following, the appellants were served with a charge sheet which set out a charge to the effect that the appellants had been guilty of serious misconduct, in that, neglecting their duty, they had been playing cards and gambling in the Blacksmith Shop from 1 a.m. to 3 a.m. in the night of 9-2-1952. The charge-sheet also called upon the appellants to show cause why they should not be punished with the penalty specified in item 6 of a list of penalties set out therein. Item 6 was "removal from service." In form, therefore, the notice was one, requiring the appellants to show cause both as to why they should not be found guilty of the charge framed against them and as to why the proposed penalty should not be inflicted.

3. In answer to the charge-sheet served on them, the appellants submitted an explanation on 29-3-1952. The explanation was not considered satisfactory and a Committee of Enquiry, constituted of respondents 4, 5 and 6, namely, the Personal Assistant to the Deputy Chief Mechanical Engineer, the Assistant Works Manager, Lillooah and the Employment Officer, was set up for carrying out an investigation into the charge. It appears that the proceedings before the Committee were protracted and occupied as many as eight months. The appellants were represented before the Committee and took part in its proceedings at every stage.

4. After the Committee of Enquiry had reported, the Works Manager considered the report along with the explanation submitted by the appellants. Upon doing so, he formed the opinion provisionally that the appellants should be removed from service and accordingly by two separate notices, dated 24-1-1953 and 28-1-1953, respectively, required the appellants to show cause why the penalty of removal from service should not be inflicted on them. It will thus be noticed that although the charge-sheet looked like intending to give the appellants only a single opportunity for defending themselves, in fact, the strict procedure prescribed by the Disciplinary Rules was followed and a second opportunity, limited to showing cause against the penalty proposed, was given.

5. Up to the stage of the notice requiring the appellants to show cause against the penalty proposed to be imposed, no irregularity is alleged to have been committed. On receiving the notices, the appellants asked for copies of the proceedings before the Committee of Enquiry. The request was made by a petition dated 30-1-1953, but on 2nd February following, the appellants were informed that the copies asked for could not be supplied to them as it would be against a Departmental Rule to do so. A second request elicited a similar reply dated 6-2-1953, and the relevant Rule which according to the Railway Administration, forbade the supply of a copy of the proceedings at that stage was set out in extenso. The original notice had given the appellants seven days' time to show such cause as they might have to show, but by the subsequent letters, the time was extended. Further correspondence followed of which particular mention may be made of a letter from the appellants, dated 11-2-1953. By that letter they protested once again against the refusal of the Railway Administration to supply them with copies of the proceedings before the Committee of Enquiry and they submitted that the Rule relied upon by the Railway Administration could not possibly stand in their way of doing so. The Administration, however, did not change their mind. By a notice dated 18-2-1953, they informed the appellants that they were being removed from service and that, accordingly, their services would stand terminated from the forenoon of that very day. The relevant portion of the notice read as follows :

> "As your services are no longer required by the administration you are hereby removed from service by my order in terms of your agreement and conditions of service, and you are hereby given one month's pay in lieu of notice with effect from 18-2-1953 as provided for therein. Your services will accordingly be terminated on the forenoon of 18-2-1953."

6. The notice was signed by the Deputy Chief Mechanical Engineer.

7. Against the order of removal, the appellants preferred an appeal. The appeal did not succeed. By a communication dated 28-10-1953, the Appellate Authority informed the appellants that he did not find any justification or any extenuating circumstances for revising the order of removal and that, on the other hand, he felt that in view of the seriousness of the offence, the appellants had been leniently treated.

8. Having thus been unable to obtain any relief from the Railway Administration, the appellants moved this Court under Article 226 of the Constitution on 1-12-1953, and obtained a Rule from Sinha, J., At the hearing of the Rule, however, the learned Judge discharged it in the view that the services of the appellants had been terminated in accordance with the conditions of their service

and consequently Article 226 would have no application.

9. The only point which was urged in support of the application was that the appellants had not really been given an opportunity to show cause against the penalty proposed to be imposed on them, because without knowing what the findings of the Committee of Enquiry against them had been or what the decision of the Works Manager on those findings was, it was wholly impossible to show the cause which they had been asked to show. A penalty is always related to the offence for which it is imposed. The appellants' contention was that without knowing of what offence they had been found guilty, they could not possibly show cause as to why the penalty of removal from service should not be inflicted on them, because they had no materials in their possession on which they could frame any submission as to whether the proposed penalty was appropriate or inappropriate. Sinha, J., agreed with the appellants that if their removal from service was regarded as having been directed in exercise of the Railway's Disciplinary Jurisdiction, it had been vitiated by an irregularity and could not be upheld. The learned Judge, however, thought that there was another aspect of the case which had to be considered. He referred to the fact that the order of removal served upon the appellants made no mention whatever of any offence committed by them for which they were being removed from service. In his view, the most important document to be considered as to whether the Railway had proceeded by way of punishment or otherwise was the order itself. Since the order did not, on the face of it, contain anything from which it could reasonably be concluded that the Railway had proceeded by way of punishment and not by way of enforcing the conditions of service, the learned Judge thought that he would not be justified in holding that the Railway had acted on any basis other than the basis which the order itself disclosed.

> "I am therefore inclined to hold", observed the learned Judge, "that the Railway, in passing the impugned order, has merely proceeded to enforce the conditions of service under the Railway Establishment Code and not by way of punishment. That being so, it follows that the shortcomings of the enquiry mentioned above are not fatal to this case and the respondent Railway has not gone beyond what the law requires."

10. Mr. Gupta, who has appeared on behalf of the appellants, contended that the learned Judge had been completely in error in attributing to the Railway Administration an intention which they themselves did not claim to have had. It was pointed out that the counter-affidavit affirmed by respondent 6, the Employment Officer, and filed on behalf of all the respondents, made one case and one case alone and that case was that the Railway had proceeded by way of exercising its disciplinary jurisdiction and that, in doing so, they had in no way violated the Rules. It was never suggested in the course of the fairly long counter-affidavit that after carrying the enquiry up to a certain point, the Railway Administration had abandoned that line of proceeding and had fallen back on the conditions of service which entitled them to terminate the employment of the appellants on a mere month's notice without giving any reason of any kind. There was thus no scope at all, on the established facts of the case, for introducing the conditions of service and if the penalty imposed on the appellants could not be upheld as a penalty validly imposed under the Disciplinary Rules, it would have to be set aside.

11. As the basis which the learned Judge had finally adopted for his order was wholly different from the basis on which the counter-affidavit of the respondents rested, we enquired from Mr.

Bose, who is appearing on behalf of the Railway, how any question as to the Railway having acted under the Service. Regulations had entered the case at all. Mr. Bose, with his usual frankness, informed us that he alone had been responsible for suggesting that the order of removal could be supported by reference to Rule 148(3), Indian Railway Establishment Code and that it had struck him at the stage of the argument that such a suggestion could be made. With equal candour, Mr. Bose conceded that he could not possibly say that the Railway Administration had in the course of the proceedings against the appellants, at least up to the stage prior to passing the order for their removal, acted otherwise than under the Disciplinary Rules. But Mr. Bose added that since the language of the order of removal was adjustable to Rule 148(3), he had thought that he could legitimately contend that it was under that Rule that the Railway Administration had finally acted.

12. Before proceeding further, I may set out what Rule 148 lays down. The general heading of the Rule is "Termination of service and periods of notice." We are concerned here with only sub-rule (3). That sub-rule again has a sub-heading of its own which is: "Other (non-pensionable) railway servants." It then proceeds to say that the service of such railway servants "shall be liable to termination on notice on either side for the periods shown below", and proceeding further, it says by sub-clause (d), that in the case of "Permanent Non-gazetted employees", the notice required shall be a month's notice. It is thus clear that so far as this Rule goes, the Railway Administration are entitled to terminate the tenure of service of any Permanent Non-gazetted employee, if they choose to do so, by merely giving a month's notice or a month's pay in lieu of notice and so may an employee belonging to that class relinquish his employment upon giving a similar notice. In a case of a termination of service under the Rule by the Railway Administration, no question of any penalty or punishment is involved.

13. The question, however, in the present case is not whether the Railway Administration could legally have terminated the services of the two appellants before us by merely giving a month's notice or a month's pay in lieu of notice, irrespective of whether they had been guilty of any offence or not, but whether in the present case they had, in fact, proceeded under Rule 148(3). I find it wholly impossible to hold that they had done so and Mr. Bose really does not contend to the contrary. If I may only refer to what was done at some of the crucial stages, the real character of the action taken by the Railway Administration will become absolutely clear. In the first place, the charge-sheet served on the appellants is in the form prescribed in Appendix XX, contained in the "Regulations regarding disciplinary action against non-gazetted staff including removal from service, dismissal and rights of appeal." It invites a representation by the appellants, if they should have any representation to make, and asks them to show cause why a particular penalty should not be imposed on them. The penalty selected is one from a list of seven set out in the charge sheet which are all to be found in Rule 1702, Indian Railway Establishment Code, Vol. 1. Proceeding next to the second notice served on the appellants, it states that the Works Manager (M) has provisionally formed the opinion that the appellants should be removed from service and asks them to show cause within seven days why the proposed penalty should not be inflicted on them. That notice again is in the form set out at page 45 of the Book of Regulations to which I have already referred and is based on a certain letter of the Railway Board, dated 21-5-1946. Proceeding next to the letter of 6-2-1953, which is one of the letters by which the request of the appellants for a copy of the proceedings was turned down, it sets out a Circular Letter of the Deputy General Manager, which is apparently regarded as a rule, and it states that "as no penalty of dismissal or removal from service has yet been inflicted" on the appellants, their request for a

copy of the proceedings is not in order. There can be no doubt that the removal from service contemplated in the letter is removal from service by way of penalty, because it is expressly so said. Such implication of the letter becomes clearer when one refers to the terms of the Circular Letter. They are as follows :

> "If an employee against whom the penalty of dismissal or removal from service has been inflicted so desires, he should be supplied with the copies of the evidence and proceedings of the Enquiry to the extent necessary to enable him to defend his case."

14. Pausing here for a moment, it is impossible not to remark on the very odd character of this Circular Letter. If copies of the evidence and proceedings of an enquiry are at all to be supplied to an employee who is being proceeded against in the exercise of the Railway's disciplinary jurisdiction, and they are to be supplied "to enable him to defend his case", it is not easy to see what purpose is intended to be served by supplying them after the penalty has already been inflicted. Mr. Bose submitted that they were to be supplied for the purpose of enabling the employee punished to prosecute an appeal. But if the employee is to be allowed the use of the evidence and the proceedings of an Enquiry Committee for showing cause against his punishment, there can be no reason or good sense in denying this assistance while a matter is before the punishing authority, but extending it when he is already punished and the matter has gone up on appeal. Be that as it may, in the present context, the only relevancy of the letter is its clear import that while writing it, the Railway Administration were still thinking of disciplinary action and of nothing else.

15. It is not necessary to refer at length to the several statements made in the counter-affidavit, because Mr. Bose frankly conceded that the whole basis of that affidavit was a claim of having taken disciplinary action in accordance with law. Still, however, I would make a brief reference to some of the statements made in it. In para 6, the affidavit states that in spite of their acquittal by the criminal Court, the Railway Authorities had formed the opinion that "disciplinary action" should be taken against the appellants. The paragraph proceeds to say that in accordance with that view, charge-sheets had been served on the appellants and that an enquiry had been conducted "strictly in accordance with the Departmental Rules." The paragraph also states that after the conclusion of the labours of the Committee, its report had been considered by the Works Manager and that the Works Manager had given the appellants a second notice to show cause, "this time as to why the penalty of removal from service should not be inflicted on them." In para 8 it is stated that the appellants had failed to show any cause in compliance with the second notice and that after waiting for about three weeks, orders for the removal had at last been issued on 18-2-1953. Paragraph 9 is concerned with traversing what had been stated in para 8 of the petition of the appellants. They had stated that they were permanent hands and could not be removed on the ground that their services were no longer required. The reply of the Railway Administration, as given in para 9 of the counter-affidavit, is that they had "full powers to remove them from service on conforming to the Disciplinary Action Rules of the Railway Administration." It is significant that it is not stated that they had full powers to remove the appellants from service in accordance with Rule 148(3) and that they had in fact proceeded under that Rule. Paragraph 10 of the counter-affidavit is even important. It is a reply to para 9 of the petition where it had been alleged that although the appellants had in fact been removed from service by way of punishment, yet the subterfuge of saying that their services were no longer

required had been adopted in the notice of removal, because the Railway Administration wanted to conceal their failure to give the appellants an adequate opportunity for making a representation against the contemplated penalty. Here was a clear charge that the notice of removal had been deliberately framed in order to give it an appearance of something which it was not and that this had been done with a purpose. If there was any occasion for referring to Rule 148(3), the occasion was offered by para 9 of the petition, if not also by para 8. But the Railway's reply as contained in para 10 of their counter-affidavit, is not that they had in fact proceeded under Rule 148(3) which they were perfectly entitled to do, but that in view of the charge-sheets served on them and the Departmental Enquiry held in the matter, the appellants were well aware why their services were no longer required and that the notice of removal had not been couched in any particular language for concealing anything. Even towards the end of the counter-affidavit it is said in para 16 that the appellants had been given a second opportunity to show cause, but they had choosen not to make any representation. There could be no reason whatever for making any reference to the second opportunity, if ultimately the Railway had proceeded on Rule 148(3).

16. In view of the facts of the case which I have recited at some length, it seems to me to be wholly impossible to hold that the Railway Administration had proceeded under Rule 148(3) and not by way of imposing a penalty on the appellants in exercise of their disciplinary jurisdiction. In fact, as I have endeavoured to show, the Railway themselves did not make any such claim. Only their learned Advocate, as he was candid enough to admit, had thought of making the suggestion in the course of the argument as it appeared to him that some countenance was lent to it by the language of the notice of removal. It appears to me that while the Railway Administration themselves never stated to the Court that they had proceeded at any stage otherwise than in exercise of their disciplinary jurisdiction and had, in fact, insisted that it was in exercise of that jurisdiction that they had proceeded, and in their view proceeded in accordance with the Rules, it was not open to their learned Advocate to make a different case on the facts. Nor could it be open to the Court to adopt a different basis for its order, simply because something like a debating point was made before it. With great respect to the learned Judge, he seems to me to have proceeded on a basis which did not exist and which the respondents themselves never claimed to have existed.

17. Indeed, even if one goes by the notice of removal alone, it cannot justify anyone in holding that it was informing the appellants of the termination of their services under Rule 148(3). I have already read the material parts of the Rule. I am unable to see how the Railway Administration, if they wanted to intimate to the appellants that they had decided to terminate their services in accordance with R. 148 (3), could have said that the appellants "are hereby removed from service." It is quite true, as Mr. Bose pointed out, that the notice also states at the end of the paragraph that the services of the appellants "will accordingly be terminated", but 'accordingly' obviously means according to the action taken by the Railway Administration, that is to say, according to the removal from service ordered by them. Rule 148(3), as far as I can see, does not contemplate or speak of removal from service which has a technical meaning. But apart from the technical meaning it has come to acquire, it cannot mean, even in its ordinary connotation, a bare termination of service in accordance with the terms of a contract or the conditions of service. Quite apart from the fact that the case which Mr. Bose successfully made before the learned Judge was wholly opposed to the case which his clients had made in their counter-affidavit, the notice of removal appears to me to furnish too slender a basis for that case to rest on.

18. In my opinion, it is perfectly clear that the Railway Administration had proceeded by way of exercising their disciplinary jurisdiction and had passed the order of removal by way of imposing a penalty on the appellants. They had done so without giving a real and reasonable opportunity to the appellants to show cause against the proposed penalty, although, formally, an opportunity was offered. The learned Judge has himself so held. That being so and there being no foundation whatever for the quite different basis on which the learned Judge ultimately founds his decision, the order of removal must be held to have been vitiated by a material irregularity in the proceedings which had deprived the appellants of the valuable right of making their defense before they were struck down. The order of removal cannot, therefore, be upheld.

19. Mr. Bose referred us to a decision of the Patna High Court in the case of - '*Bhagwandas v. Senior Supdt., Way and Works, Eastern Rly*[1].', That case was decided after the decision of Sinha, J., in the present case and the argument advanced before the learned Judges appears to have been modelled on the view taken by the learned Judge here. In a matter of this kind, there can really be no precedent. It is true that the learned Judges of the Patna High Court quoted the general observations of Sinha, J., with approval and in fact adopted them for the purpose of the case they had to decide. The general observations made by Sinha, J., as regards the right of the Railway Administration under Rule 148(3) to terminate the services of a Permanent Non-gazetted Officer upon a month's notice as well as his observations on the difference between dismissal and removal are quite unexceptionable. I am also prepared to hold that if the Railway Authorities initiate a proceeding against an employee in exercise of their disciplinary jurisdiction, they would not thereby debar themselves absolutely from abandoning such proceedings and proceeding under other powers that they may have under the Rules and Regulations, if the circumstances so require. Whether or not it would be proper to do so in a particular case, must depend on the facts of that case. But the real question before us in this case is what the Railway Authorities had, in fact, done and I have already shown that they had done nothing else than proceed up to the last under the Disciplinary Rules. The facts of the Patna case were wholly different. There, the employee had absented himself without notice on two differed dates and thereupon a charge-sheet appears to have been served upon him. The only response he made to the service of the charge-sheet was that he began to absent himself altogether and continued to remain absent. He sent no explanation of any kind and took no notice of the proceedings which in fact did not and could not proceed any further, because the employee was neither seen nor heard of. In those circumstances, according to the affidavit

[1] AIR 1956 Pat 23

filed by the Railway Authorities in that case, what happened was that as the employee did not care to submit any explanation and continued to remain absent as before, the authorities thought that it was no use keeping him in the service of the Railway any further, because of his continued absence and, therefore, they thought they had "no alternative but to dispense with his services", which they did by a notice, expressed more or less in the language of the notice in the present case. It will thus be seen that the facts of that case are vastly different from those of the present. There, an attempt was made to commence a disciplinary proceeding, but the attempt failed on account of the determined non-co-operation of the employee and the disciplinary proceedings were not sought to be pursued further. It also appears that on receipt of the notice of removal, the employee made no protest but only asked for the payment of his outstanding dues and the Provident Fund money and thereafter having allowed as many as six years to pass, in the course of which he served a notice on the Railway Authorities under Section 80, Civil Procedure Code, he at last thought of Article 226 and made an application in 1954 against an order passed against

him in 1948. I cannot see that the decision of the Patna case has any relevancy to the case before us or that it furnishes a precedent which we may or ought to follow.

20. The only question that remains is what order we ought to pass. Quite inexcusably, the Rule issued in the case has not been included in the paper book, but we have referred to the Order-sheet for its terms. In so far as a writ of mandamus is concerned, the issue of such a writ is out of the question at the present stage, because the Rule only proposed an order, directing the Railway Authorities to forbear from giving effect to the notice of removal. Effect having already been given to the notice, there is nothing left now to forbear from. Nor is it possible to give any relief by means of the issue of a writ of certiorari of quashing the order, because the Rule issued was in the form of a Rule nisi only, asking the respondents to show cause why a writ should not be issued to them directing them to bring up to this Court the records of the proceedings so that the relevant orders or the notice of removal might be quashed. If that Rule is now made absolute, the only effect would be to require the respondents to send up the records. In view of the form in which the Rule was issued, it is thus not possible to give any relief to the appellants, or at least direct an immediate relief, in terms of any of the High prerogative writs. Article 226, however, is not limited to writs but speaks of orders and directions as well. It is true that the Article speaks of not orders and directions simpliciter, but orders and directions "to any person or authority, including in appropriate cases any Government." In practice, however, actual orders affecting the orders complained of are made and it is not that only orders or directions are issued to subordinate Courts or Tribunals. The Rule issued in the present case also asks the respondents to show cause why the notice of removal should not be withdrawn or cancelled. It was perhaps not very accurate or felicitous to limit the prayer to the notice, because, strictly speaking, the removal of the notice would not give the appellants complete relief, in asmuch as the order passed against them might, nevertheless, remain. In all the circumstances of the case, it seems to us that the order of removal from service passed against the appellants ought to be cancelled, subject to the saving we are presently going to mention.

21. In the result, this appeal is allowed, the judgment and order of Sinha, J., is set aside and the order of removal from service, passed against the appellants and referred to in the notices served upon them is cancelled. As only the last stage of the proceeding was vitiated by irregularity, the respondents shall be at liberty, if they are so advised, to complete the proceeding in accordance with law from the stage after the Works Manager's consideration of the report of the Enquiry Committee.

22. The appellants are entitled to the costs of this appeal. We assess the hearing-fee at five gold mohurs.

Lahiri, J.

23. I agree.

Appeal allowed.