CALCUTTA HIGH COURT

Kishan Prasad

Vs.

Union of India

A.F.A.D. No. 814 of 1955

(K.C. Das Gupta and B.K. Guha, JJ.)

28.08.1958

JUDGMENT

Das Gupta, J.

1. The appellant entered the service of the East Indian Railway on 15-1-1942 as a temporary cleaner. On 29-5-1942 he was confirmed as a cleaner. Thereafter, he has continued to serve the Railway as a permanent employee of the Railway till in September 1949 he was serving the Railway as a Driver. On 19-9-1949 a report was made against him for his alleged conduct deliberately aiding the removal of coal from a wagon. This matter was enquired into by some officers of the Railway who submitted a report against the appellant, the report being that he was guilty of the conduct alleged. A charge sheet was then served on him wherein he was formally charged with the offence of

> "aiding in the removal of coal from the wagon drawn from the colliery siding while working Ist Down Asansol Pilot on 18-9-49 with engine 523 CA while standing at the Bogra Level crossing gate Lodge'".

His explanation was that he had already replied to the charge brought against him in the enquiry held on 21-9-1949 and that he had nothing further to say. It is not disputed that in the enquiry held on 21-9-1949 he had pleaded not guilty to the charge. After this an order was made by the Divisional Superintendent, East Indian Railway, "Remove him from service". Thereafter, the Divisional Superintendent issued on him a notice the relevant portion of which ran thus :

> "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 notice with effect from 6-11-49 as provided for therein. Your services will accordingly terminate on the forenoon of 6-12-49".

The notice bore the date 1-11-49, but was signed by the Divisional Superintendent on 4-11-49. An appeal by him to the Deputy General Manager, Calcutta against this order was unsuccessful.

The present suit was brought by the appellant with the averment that the Railway Administration had acted wrongfully and arbitrarily and without any jurisdiction in dismissing him from his service. He prayed for a declaration that the dismissal order passed by the Divisional Superintendent and communicated to the plaintiff was wrongful, illegal and unjust and was not binding on the plaintiff. It was mentioned in the plaint that a notice under Section 80 of the Code of Civil Procedure had been sent by him through registered post on 21-1-1950 and had been duly received by the General Manager, East Indian Railway on 28-1-1950. It was further stated that a further notice under Section 80 of the Code of Civil Procedure was sent by registered post to the General Manager and was received by him on 2-3-1951.

2. The defense was two-fold. First, it was said that the Divisional Superintendent was perfectly right and justified in removing the plaintiff from service on and from 6-12-1949 with a month's notice dated 1-11-1949 and that no arbitrary and unjustified order had been passed and the removal of the plaintiff was according to the rules. The second defense was that there was no valid and sufficient notice under Section 80 of the Code of Civil Procedure . Though that was the substance of the defense, it is necessary that the exact words of paragraph 12 of the written statement in which this defense was raised should be set out at this stage. That paragraph is in these words :

> "That the plaintiff has made out an inconsistent and a new case as against that as set out in the notice under Section 80 Civil Procedure Code. Hence the suit is to be dismissed".

3. Two of the issues that were framed need only be set out. They are issues Nos. 4 and 5 and are in these words :

> "4. Was the plaintiff wrongfully dismissed from service?

5. Has proper legal and valid notice under Section 80 Civil Procedure Code been served? Is the suit liable to be dismissed for want of such proper notices?"

4. As the notice to which the plaintiff himself refers as communicating an order of dismissal itself shows that the order was not one of dismissal but one of removal, the trial court observed this and then considered the question whether action had been taken under Rule 148 of the Indian Railway Establishment Code or under the disciplinary provisions of the Indian Railway Establishment Code contained in its Rules 1708 and 1709. He was of the opinion that as the plaintiff had been confirmed as a cleaner on 29-5-1942, he was no longer in temporary employment and so clause (1) of Rule 148 of the Indian Railway Establishment Code was not applicable. Without pausing to consider whether the order of removal may properly be considered to be one made under clause (3) of Rule 148 of the Indian Railway Establishment Code, the trial court went on to consider whether the proper procedure laid down in Rule 1709 for removing railway officials from service had been followed. He came to the conclusion that this had not been followed. Ultimately, he recorded his findings in these words :

> "Considering all the above matter I find that the plaintiff was wrongfully removed from service without following the proper procedure".

5. As regards the notice under Section 80 of the Code of Civil Procedure , the trial court held that under Rule 5 of Order 8 of the Code of Civil Procedure the defendant should be taken to have admitted that the subsequent notice under Section 80 of the Code of Civil Procedure which was sent by the plaintiff through the pleader Sri Sripati Banerjee was for this suit and for the reliefs claimed in this suit and accordingly proper, valid and legal notice under Section 80 of the Code of Civil Procedure had been served upon the defendant.

6. On these findings, the trial court decreed the suit and gave the plaintiff a declaration that the order of his removal from the service of the East Indian Railway was illegal, wrongful, ultra vires and not binding on him.

7. The defendant appealed. Before the learned Subordinate Judge who heard the appeal the two main defenses which had been taken at the trial were pressed again. It appears also that his pointed attention was drawn to Rule 148(3) of the Indian Railway Establishment Code. The learned Judge seems to be of opinion, though this is not very clear, that if the plaintiff was a permanent employee, the Railway could not terminate his service without following the procedure laid down in Section 240 of the Government of India Act, 1935. He, however, added a finding that the use of the word "removal" in the notice showed that the Railway actually intended to remove the plaintiff from service in accordance with the procedure prescribed in Rule 1709 and that Rule 148(3) could not be invoked by the defendant in its aid and so no question of excluding the operation of Section 240 of the Government of India Act arises at all. He agreed with the trial court that the procedure prescribed in Rule 1709 had not been followed.

8. As regards the defense plea of insufficient notice under Section 80 of the Code of Civil Procedure , the learned Judge, however, disagreed with the trial court and held that as the onus was all along on the plaintiff to prove the validity and sufficiency of the notice under Section 80 of the Code of Civil Procedure and he had adduced no evidence at all in support of his averment in the plaint, no adverse presumption could be made against the defendant for non-production of the second notice under Section 80. Accordingly, he held that the plaintiff had failed to prove that the notice under Section 80 of the Code of Civil Procedure was according to law. In this view, the learned Judge allowed the appeal and dismissed the suit.

9. The first point for consideration in this appeal is whether the court of appeal below is right in its view that the suit should fail because of the notice under Section 80 being insufficient. It is settled law that this requirement of Section 80 has to be strictly satisfied and that the burden of proving such satisfaction is on the plaintiff. In coming to the conclusion, however, whether the plaintiff has discharged this burden or not it is necessary for the Court to take into full consideration the pleadings of the parties. In the present case, as has already been stated, the plaintiff claimed to have given two separate notices under Section 80. As regards the second notice he further stated in paragraph 12 that

> "the plaintiff by that notice duly informed the defendant that this suit with the reliefs claimed herein would be filed in due course on the cause of action mentioned therein".

In the written statement the defendant has not denied the receipt of these two notices. From what the defendant said in the written statement we are bound to hold that the service of both the notices had been admitted. All that has been said about the notice under Section 80 is in

paragraph 12 of the written statement, which has already been set out above.

10. When the receipt of notice is not denied but an objection is taken that the notice as served was not a valid and sufficient notice, it is necessary for the court to look into the notice to come to a conclusion as regards this validity or sufficiency. Unfortunately, while both the notices are admitted to have been received, only one of these notices has been exhibited by the defendant in court. The other notice, namely, the second notice under Section 80 has not been produced nor has any explanation been given for its non-production. I cannot see how in such a position the defendant can be permitted to say that the notice is not valid or sufficient. It appears, in my opinion, to be proper and reasonable to decide from the non-production of the notice, which on its admission of service must be taken to be in the defendant's custody, that if the notice had been produced, it would have shown that it was valid and sufficient. It would be an odd position, in my opinion, to allow a party to hold back the document in his custody which is the only document on which a proper conclusion could be made on the point raised by him and at the same time to allow him to say that the requirements of law have not been satisfied. In my judgment, it is proper for the court to hold in the circumstances of this case that the notice under Section 80 is valid and sufficient.

11. The first notice is before us. The only point in which it was said to be insufficient is that whereas in the suit the relief prayed for is a declaration that the order of dismissal was wrongful and not binding, the notice mentioned only a relief for damages. It is interesting to notice in this connection that in paragraph 12 of the written statement it was not said that the relief asked for in the suit is different from the relief set out in the notice. What is said is that an inconsistent and a new case had been made. I think it is reasonable to read these words as referring to a new and different cause of action and not that a different relief has been asked for. In any case, when the second notice which is in the custody of the defendant is being withheld, it is, as I have already stated, reasonable to think that the notice, if produced, would have shown that it is sufficient and valid. I have, therefore, come to the conclusion that the learned court of appeal below is wrong in its view that the suit should be dismissed because of insufficiency of the notice under Section 80 of the Code of Civil Procedure .

12. If that were all, we would be bound to allow the appeal and restore the decree of the trial court. On behalf of the respondent Mr. Bose has, however, argued that even if the court of appeal below is wrong in its view as regards the notice under Section 80 of the Code of Civil Procedure , his decision in dismissing the suit is correct, because according to Mr. Bose the correct position is that the railway authorities took this action of terminating the service of the appellant in pursuance of the special contract of service and not by way of disciplinary action under Rule 1709 of the Indian Railway Establishment Code.

13. It is necessary, therefore, to consider whether in fact the railway took action in this case in pursuance of the special contract which enabled them in terms of Rule 148(3) to termitnate the service of the appellant by one month's notice or whether in fact they were taking disciplinary action under Rule 1709. There cannot, I think, be any doubt that where there is such a special contract it is open to the railway to terminate the services of an employee in pursuance of that contract and where this is done, they would not, except in the case which I shall presently mention, be considered to have acted unconstitutionally, merely because the special requirements of Section 240 of the Government of India Act were not complied with. It is equally well settled

that even when there is such a contract, it is open to the railway authorities to decide not to enforce the special term entitling them to terminate employment by a month's notice but to follow the special procedure laid down in Chapter XVII of the Indian Railways Establishment Code, specially in its Rules 1707 and 1709, for taking disciplinary action. Of these, Rule 1707 lays down the procedure for dismissal and Rule 1709, the procedure for removal. It is not disputed also that where the railway authorities decide to take action in their exercise of disciplinary powers as distinct from their contractual powers, the railway servants would also be entitled to the protection of Section 240 of the Government of India Act. Whether in a particular case the railway has acted by way of enforcing the contractual right of terminating the employment by service of a month's notice, or whether it has proceeded by exercise of the disciplinary powers is a question of fact which is to be decided on the facts and circumstances in each case. As I have already stated, the trial court has not taken into consideration the provisions of Rule 148(3) and appears, from the mere fact that Rule 148(1) was not applicable, to have reached the conclusion that action in exercise of disciplinary powers was only taken. The learned Subordinate judge who heard the appeal also seems to be of opinion that once the employee is a permanent employee there is no question of enforcement of the contractual right free from the restraining provisions of Section 240 of the Government of India Act. He did, however, record a finding that Rule 148(3) cannot be invoked by the defendant in its aid.

14. On behalf of the appellant Mr. Chatterjee has tried to convince us that this is a finding of fact binding on us and it will not be proper for us to go into the evidence ourselves to see whether the action taken was under Rule 148(3). I am unable to accept this contention as correct. If the learned Judge has considered the evidence, then his conclusion on the evidence, whether right or wrong, would be binding on this Court. I find, however, that he did not consider anything except what might be called the fringe of the evidence. He has relied on the word "removal" that has been used in the notice and the charge-sheet that was issued and according to him these show that all that the railway actually intended to do was in exercise of the disciplinary powers. When in arriving at a finding the final court of fact refuses to look into the evidence on the record, its finding is in my judgment vitiated by an error of law and it becomes necessary and proper for this Court even in second appeal to look into the evidence itself to examine whether that finding is correct, except where it decides to send the matter back to the court of appeal below for a proper conclusion on facts.

15. In this case, we have not thought it proper to remit the case to the court below for such a conclusion. With the assistance of the learned Advocates we have examined the evidence ourselves. On such examination we find the following facts established :

(1) On 19-9-1949 a complaint was made against this appellant of his having aided the removal of coal from a wagon.
(2) An enquiry was ordered to be made by three officers and these three officers held a joint enquiry and reported that this appellant was responsible "for aiding in the removal of coal from the wagon drawn from the colliery siding". This was on 23-9-1949.
(3) On 27-9-1949 the Divisional Superintendent ordered: "Issue a charge sheet to Driver".
(4) On 10-10-1949 a charge sheet (Ext. A) was sent to the appellant. He gave a reply in these words :
"I have already replied to the charge brought against me in the enquiry held on 21-9-49

and I have nothing furthermore to say".

(5) On 25-10-1949 the Divisional Superintendent recorded an order on this very charge sheet "removing him from service". The notice informing him of the removal from service with a month's notice was thereafter issued. It appears to bear the date, 1st of November 1949 but was signed by the officer on 4-11-1949.

16. In deciding on these facts the question whether the railway authorities were proceeding in exercise of their disciplinary powers or by way of enforcing the contractual rights, it is necessary to consider Rules 1708 and 1709 which deal with the power of removal from service. Rule 1708 provides that a railway servant shall be liable to be removed from the service in the following circumstances, viz :

"(i) inefficiency,

(ii) committing any offence for which he may be dismissed under Rule 1706,

(iii) repeated minor offences,

(iv) absenting himself or overstaying sanctioned leave, without sufficient cause,

(v) incivility to the public :

Provided that nothing in these rules shall abrogate the right of a General Manager, in exceptional circumstances, to remove a non-pensionable non-gazetted railway servant from service in terms of his agreement without application of the procedure described in the rules in this section and without assigning any reasons if he considers it desirable to do so. This power shall not be delegated to an authority lower than a Head of a Department".

Rule 1709 which follows lays down the detailed procedure for the disciplinary action of removal. The main provision is that "when a Railway servant who has completed seven years' continuous service is charged with an offence meriting removal from the service under Rule 1708, the procedure outlined in Rule 1707 shall be applied; provided that the officer competent to pass the order of discharge may dispense with the departmental inquiry and make an enquiry in any manner deemed proper by him, recording his considered opinion before passing the order of discharge. Where a departmental inquiry is dispensed with and if, thereafter, the railway servant asks to be heard in person, the officer competent to pass the order of discharge shall grant the railway servant a personal interview at which the former may be accompanied by another railway servant."

Side by side with this we have to consider Rule 148(3) which is in these words :

"The service of non-pensionable railway servants shall be liable to termination on notice on either side for the periods shown below".

From the other provisions of Section 148 it appears that other railway servants are temporary railway servants or apprentices and the period shown as the requisite period of notice is one month's notice for permanent non-gazettetd employees to which class the present appellant belongs.

17. It is in my opinion proper to believe that the Divisional Superintendent was conscious in his

mind of the provisions of rules 1708 and 1709 as well as of the provisions of rule 148(3) when he was dealing with this matter.

18. We find that in fact the only action he took which might be said to have been an action in exercise of the disciplinary powers is that a charge sheet was given. No other part of the procedure which is to be followed in action under Rule 1709 was taken. I find it impossible to agree with Mr. Chatterjee that the mere fact that a charge sheet was submitted shows that the action was taken in exercise of the disciplinary powers. In my opinion, it is not only proper but reasonable that even where disciplinary action is not intended to be taken but enforcement of contractual right is intended, the employee should be given a chance of explaining the conduct in view of which a contractual right is intended to be enforced against him. In my view, the action in sending the charge sheet is consistent both with action being taken in enforcement of the contractual right as well as such action being taken in exercise of the disciplinary powers. No conclusion can, therefore, be based on the mere fact that a charge sheet was submitted.

19. When we find, therefore, that none of the other steps contemplated in Rule 1709 was taken, but merely on a consideration of the reply given by the appellant to the charge sheet the order was made - "remove him from service". I find it impossible to say that the railway authorities were acting in exercise of the disciplinary powers. It seems to be reasonable to think from the very fact that no other steps contemplated in Rule 1709 were taken, that they did not intend to proceed under that rule. It is argued, however, an argument which found favor with the court of appeal below, that when the word "removed" was being used, action in exercise of the disciplinary powers could only be intended. With this I am unable to agree. It may well be that often the words "removed from service" are used when speaking of removal by way of penalty in exercise of the disciplinary powers. But it is in my opinion unjust and unfair to read into every use of the word "removed" this limited meaning. In relation to the fact already mentioned that the authority concerned did not take any of the other steps contemplated in Rule 1709 one has also to take into consideration the fact that a month's notice was being given. Mr. Chatterjee has argued that giving a month's notice may merely be a compassionate order even when exercise of disciplinary powers is being intended. He has in this connection referred us to a decision of this Court in *Prasadi v. Works Manager, Lilooah*[1], There the notice of removal was in terms almost identical with the present notice and considering that notice along with the many special facts set out in the judgment, a Bench of this Court came to the conclusion that there the Railway was not proceeding under Rule 148 (3) but only by way of disciplinary powers. It is important to notice that this provision about one month's notice does not appear to have been specifically referred to in that judgment. We have to remember that in coming to a conclusion in that case that in spite of the terms used in the notice the action taken was not under Rule 148(3) this Court relied on very many special facts which are absent in this case. Definite statements had

[1]61 Cal WN 1 : (AIR 1957 Cal 4)

been made in the affidavits used in that case which was an application under Article 226 of the Constitution for issue of a writ, that action had been taken in fact under Rule 1709. Mention was also made there about two separate opportunities having been given, one calling upon the employee to show cause generally against the charges against him and thereafter after the charges have been established another opportunity to show cause against the penalty proposed. I do not think that the decision in that case based on the special facts and circumstances of that case can be of any assistance to us either in coming to the conclusion on the main question or even on the question of interpretation of the notice that was given.

20. On a consideration of the facts mentioned above, I have come to the conclusion that the railway authorities did proceed in this case under Rule 148(3) of the Indian Railway Establishment Code and not under Rule 1709.

21. It was laid down by the Supreme Court in *P. L. Dhingra v. Union of India*[2], that even though in form the Government purported to exercise its right to terminate the employment or to reduce the servant to a lower rank under the terms of the contract of employment or under the rules, in truth and reality the Government should be held to have terminated the employment as and by way of penalty if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion. There is no question in this case of any forfeiture of his pay and allowances and the question of loss of seniority or stoppage or postponement of chances of future prmotion does not arise in this case.

22. My conclusion, therefore, is that the order of removal having been made in exercise of the contractual right of the Railway to terminate the employment, the provisions of Section 240 of the Government of India Act, 1935 do not come into operation and the plaintiff is not entitled to obtain the declaration that the order of removal was wrongful.

23. I would, therefore, dismiss the appeal, but as the ground on which the lower court held in favor of the defendant cannot in our opinion be sustained, I would order that the parties would bear their own costs.

Guha J.

24. I agree.

Appeal dismissed.