BOMBAY HIGH COURT

The Secretary of State

Vs

Yadavgir Dharamgir

(Broomfield, C.J. Macklin, J.)

18.07.1935

JUDGMENT

Broomfield, J.

1. This is an appeal from a judgment of the First Class Subordinate Judge of Jalgaon awarding the plaintiff Rs. 3,915 damages for breach of contract.

2. The plaintiff was an employee of the Great Indian Peninsula Railway, which is a State-owned railway represented by the defendant, the Secretary of State. He was a passenger-brakesman employed at Bhusawal. It appears that in February, 1930, there was a general strike of the Railway employees which the plaintiff joined. There were negotiations between the All-India Railwaymen's Federation on behalf of the employees and the Railway Board. Certain terms of the settlement of the dispute were offered by the Member of Commerce and Industries and they were accepted by the Federation. These terms were issued in the form of a communigue by the Government of India and they were briefly embodied in a notice which was published by the Agent of the G. I. P. Railway. There is no dispute now as to the terms. They were :Strikers who present themselves (or duty on or before March 15, 1930, and who have not been discharged for reasons other than going on strike, will be reinstated in their former posts if they have not been permanently filled, or in some other suitable vacancy, if available. Strikers presenting themselves for duty on or before March 15, 1930, who cannot be taken on immediately because their posts have been permanently ruled, or because no other suitable vacancy is available, will have their names registered and will be offered employment on the G. I. P., E. I. or N. W.. Railways as posts become available.The plaintiff alleged in his plaint that this agreement was broken as he was not re-employed in accordance with the terms offered and he claimed damages on the footing that he was entitled under the rules governing railway servants to be re-employed till he reaches the age of 55, that is, for eleven more years, and to draw pay and gratuity accordingly. It is an admitted fact that the plaintiff was not re-employed. The defendant alleged in his written statement that the plaintiff had not complied with the terms of the offer made to the strikers and had not applied to

be reinstated in time. That point was found in plaintiff's favour by the trial Court and is not now contested. It was also alleged in the written statement that the plaintiff had been discharged before the agreement was arrived at. But this fact has not been proved, and as I have said, the trial Court awarded the plaintiff Rs. 3,915 damages, with future interest, calculated on the amount he would have earned if he had been employed for a period of five years from February 14, 1930.

3. In this appeal by the Secretary of Star he learned Advocate General on behalf of the appellant has taken three points : (1) that there was no contract enforceable against the Secretary of State upon which the plaintiff could sue ; (2) that, assuming there was such a contract, the plaintiff would be entitled to no damages, because the Secretary of State could dismiss the plaintiff like any other Government servant at his pleasure without notice ; (3) that in any case the damages have been wrongly assessed.

4. The first point is based upon Section 30 of the Government of India Act, which provides that contracts which are to bind the Secretary of State must be executed on his behalf and in his name and by such person and in such manner as the Goveraor-General-in-Council directs or authorises. From the language of section and from the authorities (*Municipal Corporation of Bombay v. Secretary of State*[1] and *Municipal Corporation of Bombay v. Secretary of State*[2]) it is dear that in order to bind the Secretary of State by a contract there must be a deed executed on his behalf and in his name by the proper authority. In the present case no such deed has been produced nor referred to. This, in my opinion, is a good point though a technical one. But the point does not arise : upon the pleadings. It was not taken in the written statement nor raised in any way at: the hearing of the suit. It has been held that a Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit : *Nathu Piraji v. Umedmal Gadwmal*[3] I do not think that the Secretary of State has any special privilege in this respect, and that being so, we do not propose to consider this preliminary objection. As it happens it is not essential for the determination of this case.

5. The learned Advocate General has referred us to a number of authorities in support of the proposition that the Secretary of State as representing the Crown , is entitled to dismiss his servants without notice. In *A.E. Voss v. Secretary of State for India*[4] it was held that the Crown has power to dismiss its servants at will and also that no authority representing the Crown is able in the employment of persons in the service of the Crown to contract with them so as to deprive the Crown of the enjoyment of that power, which can only be excluded or restricted by an Act of the Legislature. The case of Gould v. Stuart [1896] A.C. 575 was distinguished, because in that case there were certain provisions of the New South Wales Civil Service Act passed for the protection of civil servants, and it was held that the provisions of this Act constituted an

exception to the general rule that the Crown can dismiss at pleasure. *Then in Denning v. The Secretary of State for India in Council*[5] it was held that a Crown servant may be dismissed at will without notice even if there be an agreement for a. term certain, subject to dismissal for misconduct and with a provision for renewal at the end of the term. In *Bimalacharan Batabyal v. Trustees for the Indian Museum*[6], where an action for damages for wrongful dismissal was brought by the plaintiff who was a head clerk 'under the Trustees of the Indian Museum, it was argued on his behalf that he was practically in the same position as a Government servant. The Court held that he was not a Government servant. It also held, however, that that would have made no difference, because Government servants are liable to be dismissed at pleasure, notwithstanding tide provisions of Section 96- (B) of the Government of India Act. Mr. Justice Costello held that the (sic) of dismissal is only limited in so far as there: are definite and special rules or regulations laying down the method by -which or the circumstances in which that right is to be exercised. Then in another English case, *Shenton v. Smith*[7] it was held that the general rule, viz., that a Government servant can be dismissed at the pleasure of the Crown or Government will apply unless the plaintiff can point to some statutory exception. That was an action brought by a medical officer in the service of the Government of Western Australia. There were certain regulations which dealt with matters of suspension and dismissal, but it was held that these did not constitute a contract between the Crown and its servants. Similarly, in *Jehmgir M. Cursetji v. Secretary of State*[8] it was held by Mr. Justice Tyabji that public servants hold their offices at the pleasure of the Sovereign and are liable to dismissal at his will and pleasure, if the power of dismissal is not limited by statutory provision. There are certain observations in Mr. Justice Tyabji's judgment which are relied upon by the learned advocate for the plaintiff. I shall deal with these a little later.

6. There can be no doubt as to the effect of the cases to which I have referred. The general rule is that a Government servant holds office during pleasure and is liable to be dismissed at any time without notice and without reason assigned. The rule may be subject to exceptions but they must be statutory exceptions, and in this country apparently they must be contained in rules made under the Government of India Act, for instance, the fundamental rules governing the employment of civil servants. Further, it is for the plaintiff, who claims damages for breach of contract, to prove such statutory exceptions. It also appears from these cases that if the general rule applies, then dismissal cannot give rise to an action for damages. The learned advocate for the plaintiff has not in any way contested the principle laid down in these authorities. He has argued, firstly, that the cases cited are cases of wrongful dismissal, and his client, he says, is not claiming damages for wrongful dismissal but for breach of the contract of re-employment. In my opinion, however, the case cannot be distinguished in principle from the one which would have arisen if the plaintiff had been dismissed on the date when he says he should have been re-

employed. In fact legally the action for wrongful dismissal is an action for breach of the contract to employ.

7. The second point which has been more seriously argued is based on the observations of Mr. Justice Tyabji in fehangir M. Cursetji v. Secretary of State, which are. contained at pp. 212 and 213 of the report of that case (I.L.R. 27 Bom. 189). After referring to a number of English authorities the learned Judge said (p. 213) :-In all these cases it was broadly laid down that you cannot limit the power of the Crown to dismiss its officers at pleasure. I must qualify this proposition to this extent, that the power of the Crown to dismiss its public officers is necessarily limited by any statutory provision that may have been enacted for the benefit of such public servants, and it may not have application to such of the servants of Government as are not charged with functions which are in themselves the acts or the attributes of sovereignty. As the Secretary of State for India in Council is now liable to the same extent as the East India Company was, it seems to me to be extremely probable that the Secretary of State would be bound by his contracts with private individuals, where those individuals are not employed in carrying on those departments, which are essentially sovereign in their character.Then he cites a passage from " Ilbert's Government of India " in which the author expresses a doubt as to whether and how far the principles laid down in Shenton v. Smith and Dunn v. The Queen [1896] I Q.B. 116 would apply to contracts with such persons as, amongst others, mechanics and artificers in Railway service. Mr. Dharap has relied on the distinction there drawn and he contends that his client being merely a passenger-brakesman was not performing duties which, have anything to do with the functions of Government at all. He also relies on Mr. Justice Tyabji's expression of opinion to be found elsewhere in his judgment, that dismissal of a public servant by the Crown is an act of State and therefore outside the jurisdiction of the Courts. In my opinion there is nothing, in these points. The distinction which Mr. Justice Tyabji seeks to draw between the employees of departments which are " sovereign " in their character and employees in other departments is, I think, not maintainable in view of the other cases to which I have referred. In A. E. Voss v. Secretary of State the plaintiff was merely a clerk in the Foreign office of the Government of India. In Gould v. Stuart also the plaintiff was a clerk in the civil service. In Shenton v. Smith the plaintiff was a medical officer in the service of the Government of Western Australia. In none of these cases was the particular point urged by Mr. Dharap raised or considered. But it is difficult to see how it could have been suggested that the plaintiffs in those cases were performing functions " essentially sovereign in character ", and the distinction now suggested must,. I think, be said to be impliedly negatived. I may note that Mr. Justice Tyabji's observations, on which reliance is placed are obiter dicta. The plaintiff there was Huzur Deputy Collector and there was no dispute that he exercised functions which partook of the character of sovereignty. Apart from the fact that the definition sought to be made is inconsistent with the

cases, I am of opinion that it: would be unworkable. Opinions as to the proper functions of Government are continually fluctuating, if any such principle were to be applied it would be very difficult for the Courts to decide whether in a particular case a Government servant could or could not be dismissed. Further, the learned Advocate General has pointed out that these observations of. Mr. Justice Tyabji seem to have been partly based on an alleged distinction between the Crown as representing the East India Company and the Crown in its ordinary capacity. But in the case of Denning v. The Secretary of State there is a. discussion of the relevant statutes which seems to indicate that no such distinction could properly be made. As to the suggestion that the ratio decidendi in the cases is that a dismissal of a Government servant is an act of State, Mr. Dharap has to admit that the leading cases by which the general rule as to" the Crown's power has been established show no trace of any such doctrine.

8. A further argument on behalf of the plaintiff was that as he had never actually been dismissed and as he has all along been willing to work, he is entitled to the pay as if he had worked. I can hardly think that this contention could have been seriously put forward. In any case I think it requires no serious consideration. It is an indisputable fact that the plaintiff was not re-employed in spite of the offer made to the strikers. If he has any cause of action at all, it can only be by reason of the breach of this agreement. In view of the-cases which have been cited before us, I think it must be held that as the plaintiff was liable to be dismissed at pleasure, he has no claim to any damages whether he was dismissed or whether his application for re-employment was refused. That being so, the question of damages is somewhat academic. The learned trial Judge has treated it as though it were a case of a contract to re- . employ the plaintiff for a fixed term, i.e., up to the age of 55 ; but obviously it is not a case of that kind at all. The employment was before, and would have been again, had the plaintiff been re-employed, employment at the pleasure of Government. It seems that the case was not very skilfully placed before the learned trial Judge and he got little assistance from the bar. But even on the materials before him he was not justified in assessing the damages as he did. It was the plaintiff's duty to prove the terms of his employment. If he alleged that it was for a fixed term or subject to notice it was for him to establish that. The learned trial Judge was apparently of opinion that it was for the defendant to show that the service was terminable by notice, and if so, by what notice. There was on the record a statement elicited in the cross-examination of one of the defendant's witnesses to the effect that the services of Railway employees may be terminated by one month's notice. That evidence was not rebutted by the plaintiff. On that footing the only damages to which the plaintiff could be entitled, assuming that he was entitled to any damages at all, would be damages for the period of notice of one month. Moreover, even on the assumption that this was a case of a contract for the re-employment of the plaintiff till he reached the age of 55 (which is what the trial Judge has assumed), he has not applied the right principles. It is not a case of first

impression as he seems to have thought. Many authorities may be found in the text books. I need only refer to Halsbury, Vol. XX, paragraphs 216 and 218 ; Mayne on Damages, p. 252 ; and Odgers' Common Law, Vol. II, p. 681. It is not necessary to pursue this matter further, because, as I say, in the circumstances of this case it is clear that the plaintiff is not entitled to damages at all.

9. The appeal, therefore, must be allowed and the plaintiff's suit fails and must be dismissed.

10. We have felt some difficulty on the question of costs. It is undoubtedly in some ways a hard case. The plaintiff was allowed in the lower Court to sue in forma pauperis. The result of the appeal is that he gets nothing. The defendant has succeeded on defences which are in a sense technical defences, it being now an admitted fact that the plaintiff was not re-employed although he complied with the terms of a formal offer of re-employment. Moreover, as I have said, the case for the defendant was badly put in the lower Court. Had it been properly put there, it is doubtful whether this litigation would ever have come to this Court at all. In the circumstances we direct that the parties should pay their own costs in both Courts.

Macklin, J.

11. I agree. The first point taken by the learned Advocate General was that the agreement (if any) between the plaintiff on the one hand and the defendant on the other was not binding on the defendant by virtue of Section 30 of the Government of India Act, because it was not in the proper form and was not executed in the name of the Secretary of State. I do not think that it is necessary or even proper for us to consider this aspect of the question in appeal, since the point was not taken in the written statement of the defendant at the trial, though under the provisions of Order VIII, Rule 2, of the Code of Civil Procedure, it certainly ought to have been taken. It was suggested by the learned advocate for the plaintiff that if this point had been properly taken at the proper time, it might have been possible for him to produce evidence establishing the existence of a valid contract by which the defendant would be bound, To me it seems that this is not very probable. But I do not think: it necessary to discuss the question further, because in my opinion the point, for reasons already stated, ought to fail.

12. The next contention which the learned Advocate General has argued is more serious for the plaintiff. It is that the plaintiff is not entitled to damages at all; and reliance is placed upon the theory that the Crown can dismiss its servants at pleasure and without notice unless the power of dismissal has been limited by some statutory provision. In support of this contention reliance has been placed upon a number of cases : *Jehangir M. Cursetji v. Secretary of State* [9] A.*E. Voss V. Secretary of State for India (1906) I.L.R. 33 Cal. 669(Supra); Denning v. The Secretary of State for India in Council (1920) 37 T.L.R. 138(Supra); Bimalacharan Batabyal v. Trustees for the*

Indian Museum (1929) I.L.R. 57 Cal. 231(Suupra) and Skenton v. Smith[10] These cases fully support the existence of a right of the Crown as contended, and it appears, on these authorities, that it was for the plaintiff to point to some statutory provision by which the Crown was not entitled to dismiss him at pleasure and without notice.

13. This position is not contested by the plaintiff's learned advocate. He does, however, rely on two arguments to show that the theory has no application in the present case. His first contention is that the privilege of the Crown to dismiss its servants at will and without notice is based upon the wider theory that the act of dismissal is an act of State and that acts of State are exempt from the jurisdiction of the Courts ; and he urges that the dismissal of a servant whose duties are in no way duties of State is not an act of State. In the case of Jehangir M. Cursetji v. Secretary of State this aspect of the question was touched upon by the learned Judge who decided it. But the discussion was not strictly necessary for the decision of the case and the observations in that respect are in the nature of obiter dicta. Moreover, the learned Judge did not say definitely that the right of dismissal by the Crown would apply only to those of its servants whose employment was concerned with what may be called sovereign duties, though his opinion was inclined in that direction. In the rest of the authorities there is nothing from which it can be inferred that the right of the Crown depends upon its being an act of State to dismiss its servants, and I do not think that there is in law any valid distinction between the Crown's dismissal of one of its servants whose duties are concerned with sovereign acts and its dismissal of another servant whose duties are not concerned with sovereign acts.

14. The next argument against the right of the Crown to dismiss in this case is by reference to the plaint, which discloses a suit not so much for damages for wrongful dismissal as for damages for a breach of contract of employment or re-employment. It was argued on the evidence of the case that the plaintiff had never really been dismissed, because any dismissal that may be inferred from the fact of his vacancy having been filled up was due to the action of the Station Master of Bhusawal, who had no authority to dismiss. The situation, then, is that what the-plaintiff is really suing for is the pay which he would have earned. In my opinion there is no real distinction between this suit regarded as a suit for wrongful dismissal and a suit regarded as a suit for breach of contract of employment. It is a distinction without a difference, and the effect of either form of suit would be exactly the same.

15. The plaintiff in short Was liable to dismissal at the hands of the defendant without notice, and on that account he is not liable to damages at all. That being so, I do not think that it is necessary for me to discuss the last point raised on behalf of the appellant, viz., that damages have been assessed by the trial Court upon a wrong principle. I agree that the appeal must be allowed and the plaintiff's suit be dismissed. In the circumstances of the case I think it fair that the parties

should pay their own costs throughout.

Cases Referred.

1(1932) 36 Bom. L.R. 568
2(1904) I.L.R. 29 Bom. 580 : S.C. 7 Bom. L.R. 27
3(1908) I.L.R. 33 Bom. 35 : S.C. 10 Bom. L.R. 768
4(1906) I.L.R. 33 Cal. 669
5(1920) 37 I.L.R. 138
6(1929) I.L.R. 57 Cal. 231
7[1895] A.C. 229
8(1902) I.L.R. 27 Bom. 189 : S.C. 5 Bom. L.R. 30
9(1902) I.L.R. 27 Bom. 189 : S.C. 5 Bom. L.R. 30
10[1895] A.C. 239