

BOMBAY HIGH COURT

Sharda Prasad Tiwari

Vs.

Divisional Superintendent

Spl. Civil Apln. No. 38 of 1959

(Y.S. Tambe and V.B. Raju, JJ.)

31.07.1959

JUDGMENT

V.B. Raju, J.

1. This is a petition under Articles 226 and 227 of the Constitution by the three petitioners who are non-gazetted employees of the Central Railway, for writs of mandamus, certiorari and other appropriate writs, orders or directions in the matter of disciplinary inquiries which are being held against them, by respondent who is the Divisional Superintendent of the Central Railway at Nagpur. Petitioner No. 1 is also the Honorary President of the Co-operative Society called the Central Railway Employees' Consumers Co-operative Society, Limited, Ajni, Nagpur, which will hereinafter be referred to as the Society. Petitioner No. 2 is the Honorary Secretary of the Society. In the petition it is averred that petitioner No. 3 was a member of the Society and worked as a Treasurer only for 12 days from 18-6-56 to 30-6-56 when he was relieved of his charge as Treasurer by one Ramnarayan, that new office-bearers of the Society were elected on 31-8-58, and that the new Committee of the Society sought the assistance of the respondent, namely, the Divisional Superintendent of the Central Railway at Nagpur, for getting proper accounts from the outgoing committee of the Society on the allegation that the outgoing Committee had not handed over cash and accounts to the newly elected Committee. The Assistant Registrar of the Co-operative Societies also complained to the respondent that proper accounts of the Society were not forthcoming. The respondent thereupon ordered the suspension of petitioners Nos. 1 and 2 on 27-2-58. Petitioner No. 3 was not suspended. Charges were framed against all the three petitioners by the respondent on 8-11-58, 8-11-58 and 5-12-58 respectively. The charge against petitioner No. 1 was that while he was the President of the Society during the period from 1-7-56 to 31-8-58, he failed to discharge his duties and responsibilities as prescribed in the byelaws of the Society, resulting in excess credits being granted to members and the non-recovery of credit dues from members; that he did not check the credit and proper posting of the cash book, stock book and other account books of the Society; that he did not hand over the cash balance as noted

in the cash book, to the new Committee which took over charge on 31-8-58, which was tantamount to embezzlement of the funds of the Society; and generally that the President contributed to the general mismanagement of the Society. The charge against petitioner No. 2 was almost in similar terms. The charge against petitioner No. 3 was that he committed serious misconduct while he was a Treasurer of the Society from 1-7-56 to 31-7-58; that he failed to discharge his duties and responsibilities as prescribed in the byelaws of the Society; and that he did not hand over the cash balance to the new Committee which took over charge on 31-8-58.

2. On these charges the respondent started disciplinary enquiry against the three petitioners, and intimated the petitioners that Officers' Enquiry would be held at Ajni on 30-1-59. Petitioners 1 and 2 wrote to the respondent, objecting to the legality of the proceedings. The respondent rejected these objections by a memorandum dated 27-1-59. After the objections were rejected, the petitioners have approached the High Court for appropriate writs, challenging the order of suspension dated 27-3-58 and the charge sheets filed against them on 8-11-58 and 5-12-58 as illegal on the grounds that the respondent had no jurisdiction to take any disciplinary action against the petitioners for any act or omission of theirs as members or office-bearers of the Society, that subsidiary rule No. 4, said to have been made under Rule 1706 of the Discipline and Appeal Rules (Non-Gazetted) by the General Manager of the Central Railway, on the basis of which the disciplinary action is said to have been taken, had not been made or promulgated by the General Manager, that the action taken by the respondent was outside the scope of subsidiary Rule 4 to Rule 1706 of the Discipline and Appeal Rules, and that the subsidiary rule is further beyond the scope of the powers invested in the General Manager by Rule 1726 of the Discipline and Appeal Rules. In the petition another ground was urged, that the power given to the General Manager by Rule 1726, to make subsidiary rules, is an unlawful delegation of rule-making powers. But this point has not been urged before us by the learned counsel for the petitioners. On these grounds the petitioners pray for appropriate writs, orders and directions.

3. This is a case where the Central Railway wants to take disciplinary action against three of its servants for alleged serious misconduct. The Governor General has made rules under sub-section (2) of Section 241 of the Government of India Act, 1935, which are to be found in the Indian Railway Establishment Code. These rules have continued to be in force after the Constitution of India by virtue of Article 313 of the Constitution. Rule 2 of Chapter XVII, which is numbered as 1702 in the Code, enumerates the penalties which may, for good and sufficient reasons, be imposed upon railway servants. The penalties enumerated include dismissal from service. Rule 6 in chapter XVII, which is rule No. 1706 in the Code, enumerates the circumstances under which a railway servant is liable to be dismissed from service, and these circumstances are :

- (i) Conviction by a criminal court, or by a court martial, or
- (ii) serious misconduct, or
- (iii) neglect of duty resulting in, or likely to result in, loss to Government or to a Railway Administration, or danger to the lives of persons using the railway.

It is therefore within the competence of the Central Railway to institute a disciplinary proceeding against a railway servant if according to it any of these aforesaid circumstances existed. One of these circumstances is serious misconduct.

4. The main contention of the learned counsel for the petitioners is that misconduct outside the sphere of duties of railway servant can never amount to a serious misconduct, justifying disciplinary action against the servant under these rules. *The learned counsel relies on Laws v. London Chronicle, Ltd¹, Tomlinson v. London, Midland and Scottish Ry. Co², and Laxminarayansingh v. Corporation of City of Nagpur³,*

5. There can be serious misconduct on the part of a railway servant during working hours and during the course of his employment. But that does not necessarily mean that there can be no misconduct or serious misconduct outside the working hours or outside the course of his employment. The act or conduct of a servant may amount to misconduct :

- (i) if the act or conduct is prejudicial or likely to be prejudicial to the interests of the master or to the reputation of the master;
- (ii) if the act or conduct is inconsistent or incompatible with the due or peaceful discharge of his duty to his master;
- (iii) if the act or conduct of a servant makes it unsafe for the employer to retain him in service;
- (iv) if the act or conduct of the servant is so grossly immoral that all reasonable men will say that the employee cannot be trusted;
- (v) if the act or conduct of the employee is such that the master cannot rely on the faithfulness of his employee;
- (vi) if the act or conduct of the employee is such as to open before him temptations for not discharging his duties properly;
- (vii) if the servant is abusive or if he disturbs the peace at the place of his employment;
- (viii) if he is insulting and insubordinate to such degree as to be incompatible with the continuance of the relation of master and servant;
- (ix) if the servant is habitually negligent in respect of the duties for which he is engaged;
- (x) if the neglect of the servant, though isolated, tends to cause serious consequences.

6. That such acts do amount to misconduct has been held in *Pearce v. Foster, (1886) 17 QBD 536*. Vide also Halsbury's Laws of England, Third edition, vol. 25, at pages 485 onwards. Vide also judgment of this Court in *Madhosingh v. State, Special Civil Appln. No. 39 of 1959, decided on 13-7-1959 : (AIR 1960 Bombay 285)*.

7. The learned counsel for the petitioners however contends that these are not proper tests and that the proper test is that laid down in (1959) 2 All England Reporter 285. According to the

learned counsel, the test there laid down is that the misconduct must be inconsistent with the fulfilment of the express or implied conditions of service or such as to show that the servant has disregarded the essential conditions of the contract of service. No doubt the expression "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service" is used in this case. This was a case of alleged act of disobedience on the part of an employee Miss Jean Maude who had been employed as an advertisement Representative by a company. It was alleged that she left the conference room in defiance of the Manager's request to remain at the conference room, and it was held that wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal. It was also held that the servant can be

¹(1959) 2 All England Reporter 285 ³AIR 1955 Nag 206

²(1944) 1 All England Reporter 537

dismissed if he is habitually negligent in respect of his duties for which he was engaged, but that for a single instance of insolence in the case of a servant in such a position as that of a newspaper critic, dismissal was hardly justified. It was also observed in that case as follows:

"since a contract of service is but an example of contract in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper order of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

In a passage which I have read from 25 Halsbury's Laws of England (3rd Edn.) p. 485, para 934, there is a statement....'there is no fixed rule of law defining the degree of misconduct which will justify dismissal'. That statement is derived from a passage in the judgment of the Privy Council delivered by Lord James of Hereford in *Clouston and Co. Ltd. v. Corry*⁴, a case to which counsel for the plaintiff referred. I will read a rather larger passage which provides the context. Lord James said (ibid, at p. 129)

'Now the sufficiency of the justification depended upon the extent of misconduct. There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal.'

After referring to these cases it was held by the Court of Appeal that a single act of disobedience could justify dismissal only if it was such as to show that the servant was repudiating the contract

of service or one of its essential conditions, as would an act of willful disobedience; it was further held that the act of disobedience on the part of Miss Jean in leaving the conference room did not amount to such a wilful disobedience of an order, such a deliberate disregard of the conditions of service as justifying a summary dismissal. It is contended by the learned counsel for the petitioners that this case lays down the only correct test to be applied in regard to misconduct for which an employee can be dismissed by the employer.

8. No doubt in this case it is observed that if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. But, in our opinion, there is no real distinction between this test and the ten illustrative types of misconduct enumerated earlier in this judgment as types of misconduct for which a servant can be dismissed. In (1959) 2 All England Reporter 285 the test laid down is that the misconduct must be inconsistent with the fulfillment of the express or implied

⁴1906 AC 122

conditions of service in order to justify dismissal. The ten illustrative types of misconduct enumerated earlier are illustrations of implied conditions of service. The implied conditions of service would include conditions that the servant would be trustworthy, that his acts would justify the confidence of the employer, that the employee will not so act as to prejudice or damage the interests of the employer, that the employee would not act or conduct or behave himself in a way, inconsistent or incompatible with the faithful discharge of his duties to the employer, that he would not behave in an insulting or insubordinate manner, that he would not habitually be negligent, etc. These are all implied conditions of employment. In our opinion, the illustrative types of misconduct enumerated earlier are an application of the fundamental principle that to justify dismissal the servant must contravene the express or implied conditions of his service. The case, (1959) 2 All England Reporter 285, however, related to an employee who disobeyed the orders of her employer and the test enunciated in that case related to the case of disobedience by an employee of the orders of her employer.

9. In (1944) 1 All England Reporter 537, which was a case where the servant created a disturbance at a canteen committee for setting up a canteen for the use of Railway workers, it was held that conduct which is calculated completely to make impossible the working of the machinery that the railway company was endeavoring to set up for the benefit of the workers and indirectly for the benefit of the company itself, might amount to serious misconduct even if it happened outside the working hours.

10. In support of his contention that the petitioners joined the Railway before the Society was formed and that therefore their duties to the Society are additional duties, learned counsel for the petitioners relied on AIR 1955 Nagpur 206 where it was observed as follows:

"It is one of the implied stipulations of a contract of service that the employer will not, by

any act of commission or omission, add or suffer to be added to the employment new conditions involving obligations, dangers, or inconveniences which were not incident to it and were not within the contemplation of the employee when he was engaged.

Normally, a change of duty may be possible without the consent of the employee if it does not entail any of the above consequences. But where they do, they can only be changed with the concurrence of the employee. In every case, it will be a question of fact whether such a change of duty is derogatory, inconvenient, dangerous etc."

But the case is distinguishable because there the employee was asked to do additional duties. Every employee is always expected to be faithful in the discharge of his duties and to justify the trust reposed in him by his employer. Every employee is expected to behave himself so as not to damage or prejudice the interest or reputation of his master, whatever be the sphere of activities of the employee. These principles will be applicable to every employee right from the beginning of his employment up to the termination of his employment. They are not additional duties. The case relied on by the learned counsel for the petitioners does not therefore come to his assistance.

11. As regards the contention that the General Manager of the Central Railway has not framed subsidiary rule No. 4, the learned counsel for the respondent has produced the Central Railway Weekly Gazette dated 5-11-56, to show that the General Manager has himself framed the subsidiary rule No. 4. We therefore reject the contention that the General Manager of the Central Railway has not framed subsidiary rule No. 4.

12. Rule 1726 provides that the General Manager may, in respect of non-gazetted railway servants employed under his administrative control, make subsidiary rules not inconsistent with the rules in this section for the purpose of giving effect to them. Subsidiary Rule 4 reads as follows:

"Appropriate disciplinary action can be taken by the Administration against railway servants found guilty of charges of misappropriation and other irregularities amounting to serious misconduct in the discharge of their duties in connection with the affairs of institutions like Rly. Co-operative Societies, Rly. Institutes, Clubs and other similar bodies which are established and run by railway servants." But it is not necessary to further discuss the effect and scope of subsidiary Rule 4 or the question whether subsidiary Rule 4 is beyond the scope of the powers vested in the General Manager by Rule 1726, because Rule 1706 itself provides that disciplinary action can be taken against a railway servant for serious misconduct. Rule 1706 is framed by the Governor General, and if serious misconduct is proved, disciplinary action can be taken under Rule 1706 irrespective of the provisions of subsidiary Rule 4 framed by the General Manager. The subsidiary rule No. 4 does not add anything to the powers of the railway authorities given by the rules framed by the Governor General, and its purpose must be only to give effect

to the main rules.

13. It is also contended that under subsidiary Rule 4 to Rule 1706 disciplinary action can be taken against a person who is found guilty of misconduct, and that the expression "found guilty of misconduct" amounts to "found guilty by competent and independent authority, independent of the Railway". Subsidiary Rule 4 does not and cannot either abridge or enlarge the scope of Rule 1706, under which disciplinary action can be taken for serious misconduct on the part of a railway servant. The real question for determination is therefore whether it can be said that the charges framed against the petitioners can be said to amount to misconduct within the meaning of Rule 1706. In law even acts done by a servant outside working hours and outside the course of the employment may amount to misconduct justifying dismissal. There is no fixed rule of law defining the degree of misconduct which will justify dismissal.

14. The question therefore is whether the alleged conduct of the three petitioners amounts to such serious misconduct. That question can be decided only after all the facts are brought on record. At this stage the enquiry has just commenced and all the necessary facts are not yet brought on record. It would be open to the employees (petitioners) at the time of the enquiry to show that there are facts to justify the inference that the alleged misconduct will not amount to serious misconduct within law. That would depend on the relations between the Co-operative Society and the Central Railway, the actual misconduct alleged and proved, and its gravity. Whether the conduct is such as to be prejudicial to the interest of the Central Railway depends on the proof or disproof of certain facts, such as the nature and degree of the interest of the Central Railway in the Society. At this stage therefore, we are not prepared to hold that in this case facts have been proved to hold that the misconduct alleged against the petitioners 1 and 2 does not amount to serious misconduct.

15. The petition filed by the petitioners Nos. 1 and 2 will therefore have to be rejected. As regards the petitioner No. 3, it is averred in the petition that he acted as a Treasurer of the Society only for 12 days from 18-6-56 to 30-6-56 and that he was relieved of his duties as Treasurer from 1-7-56. But the charge sheet against him refers to alleged mismanagement during the period from 1-7-56 to 31-8-58 in his capacity as a Treasurer. If really the petitioner No. 3 was not acting as a Treasurer during any part of this period, the Railway would not be justified in framing charges against him for conduct as a Treasurer during this period. The averment in the petition has not been controverted in the return made by the respondent which is silent on the point whether the petitioner No. 3 acted as a Treasurer of the Society only from 18-6-56 to 30-6-56. The learned counsel for the respondent has however agreed to state within a week whether the averment in the petition regarding petitioner No. 3 is correct or not. If the averment is not challenged and is undisputed, then the petition of petitioner No. 3 will have to be allowed. We will therefore decide this point after a week. The petition of petitioners Nos. 1 and 2 is dismissed with costs.

16. (Further dictation on 7-8-59 at 10-30 a.m.) Today an affidavit has been filed on behalf of the

Central Railway, denying the allegation of petitioner No. 3 that he was a Treasurer for only 12 days from 18-6-56 to 30-6-56, and also denying the allegation that petitioner No. 3 was relieved of his office as Treasurer on 1-7-56. As these alleged facts are denied, it is not possible for us to hold that petitioner No. 3 was a Treasurer only for 12 days from 18-12-56 to 30-12-56 and that the Central Railway was not justified in framing a charge against him for the period 1-7-56 to 31-8-58. The fact whether he was a Treasurer only for 12 days and not during any part of the period which is the subject-matter of the charge against him, will have to be decided in the first instance at the Disciplinary Enquiry. As the main fact on which the petition of petitioner No. 3 is founded, has not been proved or admitted, his petition also will have to be rejected. It is dismissed with costs. It is of course open to petitioner No. 3 to prove these facts at the Enquiry which is being held against him.

Petition dismissed.