RAJASTHAN HIGH COURT

Union of India

Vs.

Askaran

First Appeal No. 25 of 1954
(K.N. Wanchoo, C.J. and I.N. Modi, J.)

19.04.1957

JUDGMENT

K.N. Wanchoo, C.J.

1. This is an appeal by the Union of India against the decree of the District Judge, Bikaner, decreeing the suit brought by Askaran plaintiff-respondent against the Union of India, the State of Rajasthan, and Jadavlal Kapoor. The suit has been dismissed as against the State of Rajasthan and Jadavlal Kapoor, and we are concerned only with the decree against the Union of India.

2. The case of the plaintiff was briefly this. He joined service in the Jodhpur Bikaner Railway as clerk on 1-8-1919. Later, on the separation of the Jodhpur-Bikaner Railway into two railways, the plaintiff remained in the service of the Bikaner Railway which was eventually taken over by the Union of India on 1-4-1950. In February 1950, the plaintiff was working as an Accountant in the Bikaner Railway in the Mechanical and Engineering Department.
He was entitled to remain in service till he completed the age of 55 years on 14-12-1952; but as Sri Kapoor, who was then the General Manager of the Bikaner Railway, was annoyed with him, he was removed from service by an order of the Chief Auditor, dated 8-2-1950, passed under para 1708 of the Railway Establishment Code (hereinafter called the Code). This order was passed without taking proceedings as required by that rule, and without complying with Article 311 of the Constitution. Consequently the plaintiff filed this suit for the pay etc. which he would have got from 8-2-1950, to the date of his retirement, namely 14-12-1952, and claimed a decree for Rs. 13,183/15/-.

3. The suit was resisted by the Union of India, and three main pleas were raised on their behalf. These were:

(1) that the notice under Section 80 of the Code of Civil Procedure was not properly served, and was not in strict compliance with that section, and therefore the suit was not maintainable;

(2) that the order passed on 8-2-1950, was under para 148 of the Code, and not under para 1708;

(3) that no proceedings were under the circumstances necessary under Chapter XVII of the Code, and that the termination of the plaintiff's services did not attract the provisions of Article 311 of the Constitution.

4. The District Judge held that the notice under Section 80 of the Code of Civil Procedure was sufficient and in substantial compliance with the law, that the removal was not under para 148, but para 1708, and therefore proceedings under Chapter XVII should have been taken, and Article 311 was applicable. Consequently he decreed the suit for Rs. 10,427/12/-.

5. In the present appeal, four points have been raised by the defendant-appellant. They are:

(1) that the notice under Section 80 was not in strict compliance with the provisions of that section, and therefore the suit was not maintainable;

(2) that the plaintiff was not removed from service under Chapter XVII of the Code, but his services were in fact terminated under para 148 of the same Code;

(3) that in the circumstances Article 311 was not applicable and no proceedings under Chapter XVII of the Code were necessary; and

(4) that no suit could be maintained for arrears of salary against the defendant, and in any case the amount awarded was not correct.

6. We have heard learned counsel on points (2) and (3) as they are the main points in the case. If the Union of India succeeds on these points, the suit must fail whatever be the decision on the remaining two points. We shall, therefore, proceed-to deal with these two points.

7. The order in dispute is Ex. 37 and is in these terms :

> "In the interest of Railway, service of Mr. Askaran Bissa, Loco Accountant, is terminated with immediate effect under Discipline and Appeal Rules, para 1708 of the Establishment Code Vol. I, and its proviso.

Under para 148 (3) RI Mr. Askaran Bissa is entitled to a month's notice but in terms of para 148(4) Mr. Askaran Bissa should be given a month's pay in lieu of this notice. The office should immediately prepare Mr. Bissa's paysheet for the pay due to him and arrange to submit his settlement papers according to rules without delay."

8. The contention of the plaintiff is based on the words "Under Discipline and Appeal Rules, para 1708 of the Establishment Code Vol. 1 and its proviso", and it is urged that this shows that disciplinary proceedings were contemplated against him under Chapter XVII of the Code and there was no intention of giving him a notice under para 148.

9. Now para 1708 deals with removal from service, and there is no doubt that if a person is to be removed from service under that para, the procedure of Chapter XVII has to be followed, namely a charge-sheet has to be given to the public servant concerned, his explanation taken, and the formalities of Article 311 complied with. There is a proviso to para 1708 which runs as follows:

> "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."

10. It is not in dispute that no proceedings of a disciplinary nature, as required by Chapter XVII, were taken in this case. It is also not in dispute that there was no written agreement between the plaintiff and the Railway, and therefore the proviso to para 1708 did not really apply. That, however, does not mean that the order Ex. 37 was not an order under para 148 of the Code. It is clear from the words "under Discipline and Appeal Rules, para 1708 of the Establishment Code, Vol. 1 and its proviso," used in this order, that the intention of the authority passing the order was not to take proceedings under Chapter XVII, for if that intention was there no reference would

have been made to the proviso which clearly lays down that proceedings under Chapter XVII need not be taken if an order is passed under the proviso. Though the words used in the proviso are 'to remove non-pensionable non-gazetted railway servant," the word 'remove' there is obviously used merely in the sense of termination of service, and not in the sense of 'removal' which is contemplated under Article 311, and which results in certain losses to the person removed. The paragraph, therefore, of the order Ex. 37 shows that the authority passing the order never contemplated taking proceedings under Chapter XVII which deals with conduct and discipline, and was intending to terminate the services of the plaintiff after notice. The mention of para 1708 in the first paragraph of the order was obviously a mistake.

11. This will be clear if we read para 148 and the second paragraph of the order. Paragraph]148 provides for termination of services and periods of notice, and is in chapter I dealing with general matters. The first clause of para 148 deals with temporary railway servants with which we are not concerned. The second clause deals with apprentices with which also we are not concerned for plaintiff was a permanent railway servant holding a non-pensionable post. The third and fourth clauses of para 148 are important, and we set them out:

> "(3) Other (non-pensionable) railway servants: The service of other (non-pensionable) railway servants shall be liable to termination on notice on either side for the periods shown below. Such notice is not however required in cases of summary dismissal or discharge under the provisions of service agreements, retirement on attaining the age of superannuation, and termination of service due to mental or physical incapacity-
> (c).....
> (d) Permanent Non-gazetted employees ..... 1 month's notice.
> (4) In lieu of the notice prescribed in this rule, it shall be permissible on the part of the Railway Administration to terminate the service of a railway servant by paying him the pay for the period of notice."

12. It is clear from the perusal of these clauses of para 148 that service of non-pensionable railway servant could be terminated by notice. This termination has nothing to do with removal or dismissal in Chapter XVII. If a railway servant is removed or dismissed under Chapter XVII, no notice under para 148 is required; nor is it necessary to pay him salary in lieu of notice. Notice is only to be given, and

salary in lieu of notice is only payable if the railway authority proceeds under para 148(3). The second paragraph of the order in dispute clearly says that the plaintiff was entitled to a month's notice, but instead of that notice being given to him, he was given one month's salary in lieu of it under para 148 (4). It is to our mind absolutely clear that this order Ex. 37 was an order for terminating the services of the plaintiff under para 148(3) read with para 148(4), and was not an order removing him from service under Chapter XVII. It is remarkable that the first paragraph of the order does not say that the plaintiff was being removed from service. It says that his services were being terminated in the interest of the railway. The plaintiff's contention, therefore, that this order Ex. 37 was an order of his removal from service to which Chapter XVII applied, and which should have been passed after the formalities required by Article 311 had been complied with, is without force. We hold that this order is an order under para 148(3) and para 148(4) of the Code terminating the services of the plaintiff after notice, and no proceedings under Chapter XVII were necessary in the circumstances.

13. It was also urged that even if this order is an order under para 148(3), the Chief Auditor was not the person authorised to give notice under para 148(3). It is enough to say that para 148 does not mention who is the person who will give notice under it. The general law therefore must be followed namely that the notice under para 148(3) would be given by the authority who appointed the railway servant whose services are to be terminated. The point that if this order is an order under para 148(3) it was not passed by a proper person was never raised by the plaintiff in the court below. The argument there was only with respect to the proviso to para 1708, and whether the Chief Auditor was the Head of the Department to whom the power under the proviso had been delegated. We have held that that proviso has no application to this case, and the order in dispute was passed under Para (3). Such a notice could be given by the appointing authority. The question whether the Chief Auditor was the appointing authority in the case of the plaintiff is a question of fact, and was never canvassed in the court below. In these circumstances, we are not prepared to allow the plaintiff to raise this point in appeal, and it must be assumed that the person giving the notice namely the Chief Auditor must have been the appointing authority in the case of the plaintiff, as otherwise he would have taken the plea that the Chief Auditor was not the appointing authority. This point is, therefore, decided against the plaintiff now.

14. Then we come to the next point canvassed before us, namely whether para 148(3) is valid. The argument on behalf of the plaintiff in this connection is that this

paragraph violates Article 311 of the Constitution, and therefore is invalid, and it is not open to the railway to terminate the services of permanent non-gazetted employees by a mere notice under this para. It is also urged that this para is in conflict with para 1046(2) of the Code which provides for compulsory retirement of ministerial servants.

15. We shall first consider whether a termination of service under para 148 would amount to dismissal or removal within the meaning of Article 311. A similar matter has been considered by the Supreme Court in *Shyamlal v. State of Uttar Pradesh,* [1] There the question was whether a certain officer could be compulsorily retired under Article 465A of the Civil Service Regulations which provides for compulsory retirement of an officer after completing 25 years' qualifying service or more, but before attaining the age of superannuation.

The argument in that case was that such compulsory retirement amounted to removal if not dismissal under Article 311 of the Constitution, and therefore the formalities under that Article should have been gone through before an order was passed under rule 465A. The Supreme Court in that connection considered the meaning of the words 'removal and dismissal' under Article 311. It was pointed out that removal and dismissal stood on the same footing except as to future employment, and that dismissal disqualified from future employment while removal does not. The Supreme Court then drew a distinction between termination of service and removal and dismissal as used in Article 311, and remarked that removal or dismissal no doubt brings about a termination of service, but every termination of service does not amount to dismissal or removal. The distinction between 'removal and dismissal' as used in Article 311, and 'compulsory retirement' under Article 465A, was brought out in these words at page 374-

> "There can be no doubt that removal - I am using the term synonymously with dismissal-generally implies that the officer is regarded as in some manner blame-worthy or deficient, that is to say, that he has been guilty of some misconduct or is lacking in ability or capacity or the will to discharge his duties as he should do. The action of removal taken against him in such circumstances is thus founded and justified on some ground personal to the officer. Such grounds, therefore, involve the leveling of some imputation or charge against the officer which may conceivably be controverted or explained by the officer."
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> "There is no such element of charge or imputation in the case of compulsory retirement. The two requirements for compulsory retirement are that the officer has completed twenty-five years' service and that it is in the public interest to

dispense with his further services. It is true that this power of compulsory retirement may be used when the authority exercising this power cannot substantiate the misconduct which may be the real cause for taking the action but what is important to note is that the directions in the last sentence in Note 1 to Article 465A made it abundantly clear that an imputation or charge is not in terms made a condition for exercise of the power. In other words, a compulsory retirement has not stigma or implication of misbehavior or incapacity."

16. We are of opinion that termination of service by notice under para 148(3) of the Code is not different from compulsory retirement under Article 465A of the Civil Service Regulations. Such termination under para 148(3) implies no stigma. It also entails no loss of the benefits already earned by the servant whose service is being terminated, though of course he cannot remain in service up to the age of superannuation. The only difference between the procedure provided in para 148(3) of the Code and that in Article 465A of the Civil Service Regulations is that the latter can only be taken advantage of after 25 years of service, while the former can be used at any time. But this, in our opinion, makes no difference to the legal position. Whether an officer is compulsorily retired under Article 465A of the Civil Service Regulations after 25 years' service, or his services are terminated under para 148(3) of the Code there is no stigma in either case, and no loss of benefits already accrued. Therefore, termination of service under para 148(3) cannot amount to removal or dismissal within the meaning of Article 311 of the Constitution for removal or dismissal is a punishment involving loss of benefits already earned. We are therefore of opinion that a rule like para 148 of the Code is not repugnant to Article 311 of the Constitution.

17. It was urged that on this view there would be no protection to government servants and this would be against the spirit of the Constitution as evidenced by Article 311. Let us see what is the spirit of the Constitution which is being invoked on behalf of the plaintiff. The main provision governing the tenure of all public servants is contained in Article 310 except those exceptional cases which are provided elsewhere in the Constitution such as, for example, the provisions relating to High Court judges. Article 310 lays down that every person, who is a member of a civil service of the Union, or of an all-India service, or holds any civil post under the Union, holds office during the pleasure of the President. Similarly, where the person is in the service of the State, he holds office during the pleasure of the Governor. This provision, therefore makes the

service of every public servant terminable at the pleasure of the President or of the Governor. He cannot claim that he must remain in service during good behavior. The fundamental provision, therefore, of the Constitution with respect to every civil servant, except those for whom special provision is made elsewhere, is that his service is at the pleasure for the President or the Governor, and is therefore terminable at his pleasure. The spirit therefore of the Constitution is not that every public servant holds office during good behavior, and his service cannot be terminated unless it is shown that he is not of good behavior. This fundamental provision has been restricted by two other provisions. The first of these is Article 311 which lays down two conditions before a person holding a civil post can be dismissed or removed. The first restriction is that this dismissal or removal in the sense in which the Supreme Court has defined it in Shyamlal's case cannot be made by an authority subordinate to that by which he was appointed. The second restriction is that if a person has to be dismissed or reduced in rank, this shall not happen unless and until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him. But these conditions only apply where a person is removed or dismissed in the sense that action is being taken against him for some misconduct or the like, and the result of his removal or dismissal would be to make him lose all the benefits he had earned before his removal or dismissal. Where, however, there is no removal or dismissal in this sense, and services are terminated without any stigma and without loss of benefits earned up to the date of the termination of service, there is no protection under Article 311. The other provision is in Article 309. This provides that recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State shall be regulated by acts of the appropriate legislature. There is also a proviso which gives power to the President or the Governor to frame rules for this purpose until provision in that behalf is made by or under an Act of the appropriate legislature. There was a similar provision in the Government of India Act, 1919, providing for the framing of rules by the Secretary of State for India. This provision regarding rules came to be considered by their Lordships of the Privy Council in *R. Venkata Rao. v. Secretary of State,* [2] and their Lordships remarked as follows at p. 34:

> "They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office though at pleasure will not be subject to capricious or arbitrary action but will be regulated by rule."

Article 309 of the Constitution has, therefore, to be read as a restriction on the power of the President or the Governor laying down that the pleasure of the President or the Governor provided in Article 310 shall be exercised according to law or rules framed under Article 309 and not otherwise. These, in our opinion, are the only general restrictions on the power of the exercise of pleasure by the President or the Governor. We should not be taken by this to mean that there are no special restrictions because there are other restrictions of a special nature dealing with special classes of public servants as for example those contained in Article 217 relating to High Court Judges. But there is no doubt that the Constitution does rot envisage that the tenure of office of public servants is on good behavior and their services cannot be terminated except on showing that they are not of good behavior. So long therefore as the President or the Governor frames rules for terminating services and lays down the manner in which their pleasure would be exercised under Article 310 it cannot be said that the spirit of the Constitution is violated by framing a rule like para 148(3).

All that is required in order that the President or the Governor may exercise his pleasure under Article 310 is that there should be rules in force laying down the manner in which the pleasure would be exercised. This means that generally speaking the protection to a public servant is only this that his services would not be terminated unless it is done under some rule or law framed under Article 309, and that the rule to be applied to him should be in existence before he joins the service. The existence of the rule at the time a public servant joins service may be inferred from the decision of the Supreme Court in Shyamlal's case. As such, if a para like 148 of the Code is in force when a public servant joins railway service, his services are liable to be terminated in the terms of that rule without in any way violating the so called spirit of the Constitution.

18. Lastly, it is urged that para 148 is in conflict with para 2046, and therefore should not be given effect to. The argument is that the age of compulsory retirement is fixed at 55 years, and if para 148 is valid para 2046 fixing the age of retirement at 55 years would become nugatory. It is enough to point out that para 148 takes into account the rule regarding compulsory retirement, for it specifically provides that it will not apply to a case of retirement on attaining the age of superannuation. We see no difficulty in rules being framed providing alternative modes of termination of services. For example, the rules may provide firstly that a person's services would be terminated on superannuation at a particular age. Secondly, that even before the superannuation age is reached, a person's services may be terminated after a certain number of years of

services, if it is in the interest of public service that this should be done without any notice to him and without requiring him to show cause, and thirdly, the rules may provide that a person's services would be terminated in exceptional cases at any time after a certain notice. The first of these cases would be like para 2046 relating to compulsory retirement. The second would be like Article 465A of the Civil Service Regulations providing for compulsory retirement after a certain number of years of service in the interest of public service even before the age of superannuation is reached. The third would be like para 148 providing for termination of service on notice. In none of the three cases is there removal or dismissal for in none of them is there any stigma attaching to the person whose services are terminated, and there is no loss of the benefits earned up to the time the service is terminated. There is, in our opinion, nothing in the Constitution which prevents three rules like these being framed to be used as and when the exigencies of public service require. We, therefore, see no irreconcilable conflict between para 2046 and para 148. Para 2046 gives the general rule of termination of service on superannuation. It can hardly be argued that such termination of service would also amount to removal or dismissal within the meaning of Article 311. Para 148 is a sort of proviso to para 2046, and applies in exceptional cases where it may be thought desirable in the interest of public service to terminate the service of a public servant before he reaches the age of superannuation by notice. We are, therefore, of opinion that para 148 cannot be said to be invalid on the ground that it is in conflict with para 2046.

19. The result is that the plaintiff's services were terminated in this case by a notice under para 148(3) of the Code. That para is valid. It is not the plaintiff's case that the para was not in existence at the time of his appointment. In these circumstances, there was no necessity of any proceedings under Chapter XVII of the Code, or of going through the formalities necessary under Article 311. The order terminating the services of the plaintiff being thus valid, the present suit must fail.

20. In view of our decision on these two points, we have not thought it necessary to consider the question whether the notice under Section 80 Civil Procedure Code was in strict compliance with the law or not, and whether the sum awarded to the plaintiff is excessive or otherwise.

21. We, therefore, allow the appeal, set aside the judgment and decree of the court below, and dismiss the suit. We order parties to bear their own costs throughout in

view of the defect of form in the order Ex. 37 which has perhaps led to this suit.

Appeal allowed.

Cases Referred.

1. AIR 1954 SC 369
2. AIR 1937 PC 31