

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.11795 of 2013

Syed Jamaluddin Ali, son of Late Syed Asghar Ali, at present residing at Azad Road, Chandwara, P.S. Town and District Muzaffarpur, Bihar

.... Petitioner

Versus

1. The Union of India through the General Manager, N.F. Railway, Maligaon, Guwahati
2. The General Manager (P), N.F. Railway, Maligaon, Guwahati
3. The Dy. Chief Personnel Officer/HQ, N.F. Railway, Maligaon, Guwahati
4. The Divisional Railway Manager (P), N.F. Railway, Lumding, District Nagaon, Assam
5. The Additional Divisional Railway Manager, N.F. Railway, Lumding, District Nagaon, Assam
6. The Sr. Divisional Safety Officer, N.F. Railway, Lumding, District Nagaon, Assam

.... Respondents

with

Civil Writ Jurisdiction Case No. 24975 of 2013

1. The Union of India through the General Manager, N.F. Railway, Maligaon, Guwahati
2. The General Manager (P), N.F. Railway, Maligaon, Guwahati
3. The Dy. Chief Personnel Officer/HQ, N.F. Railway, Maligaon, Guwahati
4. The Divisional Railway Manager (P), N.F. Railway, Lumding, District Nagaon, Assam
5. The Additional Divisional Railway Manager, N.F. Railway, Lumding, District Nagaon, Assam
6. The Sr. Divisional Safety Officer, N.F. Railway, Lumding, District Nagaon, Assam

.... Petitioners

Versus

Syed Jamaluddin Ali, son of Late Syed Asghar Ali, at present residing at Azad Road, Chandwara, P.S. Town and District Muzaffarpur, Bihar

.... Respondent

Appearance :

(In CWJC No. 11795 of 2013)

For the Petitioner : Mr. Anand Kumar Jha, Advocate

For the Respondents : Mr. Anil Singh, Advocate

(In CWJC No. 24975 of 2013)

For the Petitioners : Mr. Anil Singh, Advocate

For the Respondent : Mr. Anand Kumar Jha, Advocate

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH
and
HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)
Date: 19-02-2015

These two writ petitions; one by the employee and the other by Railway, have been filed against the order dated 03.07.2012, passed in O.A. No. 297 of 2010 by the Central Administrative Tribunal, Patna (hereinafter referred to as 'the Tribunal').

2. Syed Jamaluddin Ali (hereinafter referred to as 'employee') had been allegedly absent without authorization from duty for a considerable period. A departmental proceeding was initiated, which culminated into an order of his dismissal though he had allegedly retired from service under voluntary retirement scheme on 22.11.2007. Railway did not accept the request of voluntarily retirement and treating him to be in service, passed orders of dismissal from service. This was not interfered with by the appellate authority. When the employee came before the Tribunal, on behalf of the employee, it was urged that he having applied for voluntary retirement, on the expiry of the period, he would be deemed to have retired, in absence of order rejecting his application. It was further argued that having retired no order could be passed dismissing him from service and, therefore, the disciplinary proceeding could not



have ended in his dismissal. He also urged that the very initiation of the disciplinary proceeding was without jurisdiction and further the enquiry officer had not given any categorical finding in respect of his unauthorized leave.

3. On behalf of the Railway, it was urged that no order having been passed accepting his request for voluntary retirement, voluntary retirement could not take effect and, accordingly, he continued to be in service. Primarily, what the Railway submitted was that there being a major penalty, charge-sheet and proceeding pending, the employee could not seek voluntary retirement, nor can it be granted. He would, thus, continue in service and was rightly punished. Railway further defended the report of the enquiry officer, as also the initiation of the disciplinary proceeding.

4. In fairness to Mr. Ojha, learned counsel for the employee, we must notice that in the end he submitted that if one looks to the facts of the case i.e. 30 years of employee's unblemished service in the Railway, coupled with the fact that there was no charge involving any moral turpitude and the charge being of absence from duty as alleged, the punishment of dismissal from service, denying all retiral benefits was grossly disproportionate.

5. The Tribunal held partly in favour of both the parties. The Tribunal held that the employee had a right to apply for voluntary



retirement and the same not having been refused in terms of Rule 67(2) of the Railway Services Pension Rules, 1993, on expiry of three months' period from the date of application, employee would be deemed to have retired and once that be so, then no order of punishment with regard to service could be passed. In other words, the order of dismissal could not be passed as there did not exist master and servant relationship thereafter. But while doing so, the Tribunal then held that the charge against the employee was such that even though the order passed in the disciplinary became void, the matter had to be remanded to the disciplinary authority to reinstate the proceeding as a proceeding for forfeiture of pensionary benefit. In other words, converting the same into a proceeding for punishment in terms of what could be done in respect of superannuated employees, thus, both the parties are aggrieved by parts of the order of the Tribunal.

5. We have, to see as to what are the rights and the effect of an employee in respect of voluntary retirement and what would its consequence be on a pending departmental proceeding. In this respect, there are two sets of rules that would be relevant. One is Rule 67(2) and the other is Rule 9(2) of the Rules, relevant parts whereof are quoted hereunder :-

“Rule 67. Retirement on completion of 20 years qualifying service :-

- (1) At any time after a railway servant has completed twenty years’ qualifying service, he may, by giving notice of not less than three months in writing to the appointing authority retire from service :

Provided that this sub-rule shall not apply to a railway servant including Scientists or technical expert who is –

- (i) on assignment under the Indian Technical and Economic Cooperation (ITEC) Programme of the Ministry of External Affairs and other aid programmes;
- (ii) posted abroad in foreign based offices of the Ministries or Departments;
- (iii) on a specific contract assignment to a foreign Government unless, after having been transferred to India, he has resumed the charge of a post in India and served for a period of not less than one year.

- (2) The notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority.

Provided that where the appointing authority does not refuse to grant the permission for retirement before the expiry of the period specified in the said notice, the retirement shall become effective from the date of expiry of the said period.”

“Rule 9 (2) The departmental proceedings referred to in sub-rule (1)-

- (a) if instituted while the railway servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the railway servant, be deemed to be proceeding under this rule and shall be continued and concluded by the authority by which they commenced in the same manner as if the railway servant had continued in service.

Provided that where the departmental proceedings are instituted by an authority

subordinate to the President, that authority shall submit a report recording its findings to the President.”



7. The employee, who is resident of Muzaffarpur in the State of Bihar, joined Railway service on 03.10.1975 as Stenographer and was at Lumding in Assam. Railway had no problem with him up to the year 2004 i.e. 29 years. It appears the employee was sanctioned casual leave for 12 days. That was till 13th July, 2004, but he remained absent till 28.03.2005, when the proceedings were initiated. The proceedings having been initiated for this solitary charge of unauthorized absence, the employee responded. He stated that he had, in fact, left the place of work because of civil unrest in the area by United Liberation Front of Assam (ULFA), where employees from Bihar were being singled out, frightened and assaulted. He had threat perception. He also fell ill in between. While the departmental proceedings were pending on or about 08.08.2007, the employee made an application for voluntary retirement in terms of Rule 67(1) of the Rules aforesaid. This was undisputedly received in the office of the Senior Divisional Operation Manager of the Railway at Lumding on 22.08.2007. Thus, three months period stipulated under Rule 67 stood expired on 22.11.2007. He would thus be deemed to have retired. In the departmental proceeding, the employee objected to its initiation by an authority, who was not his controlling authority. He



then objected to the enquiry report and the findings therein. Rejecting both, the Sr. Divisional Safety Officer, Lumding passed final order on 16.07.2009 imposing penalty of removal from service, having found the employee guilty of unauthorized leave. The employee filed an appeal, but the appellate authority on 02.12.2009 rejected the employee's appeal and as such the employee filed O.A. No. 297 of 2010 before the Tribunal, which was disposed of by the impugned order dated 03.07.2012.

8. The Tribunal, by the impugned order, which is impugned by both the parties, i.e. the employee and the Railway, has held that the employee had a right to apply for voluntary retirement and upon the expiry of the period of three months from the date of his application, if no rejection order had been passed, as in the case at hand, he would be deemed to be retired and, thus, no punishment of removal from service could have been passed. This much was in favour of the employee, which is challenged by the Railway in the writ petition before us. Having held thus, the Tribunal went into facts and virtually held that it was, in fact, a case of unauthorized leave and with that finding, it remanded the matter for being converted into a proceeding under the Pension Rules for a decision thereon, virtually ordering a de novo proceeding after submission of the enquiry report for continuing the proceeding under Rule 9. This is by which the

employee is aggrieved and challenges in the writ petition before us.

9. Before proceeding further, we must state that we are not sitting in appeal as an appellate authority over the decision of the Tribunal. We are only exercising powers of judicial review, the scope of which is well-settled by now. It is not the decision but the decision making process, that can be questioned before us. Unless it can be shown that the order of the Tribunal or the authorities is perverse in the sense that it is based on no material or on irrelevant materials, the jurisdiction of this Court, thus, is limited.

10. The first submission of Mr. Ojha for the employee is that the proceedings were started by or initiated by the authority incompetent to do so. According to him, the controlling officer of the employee was Sr. Divisional Operating Manager, but the proceeding was initiated by Sr. Divisional Safety Officer. As such the very initiation of the proceeding was bad. Our answer to this is simple. The Tribunal has clearly noticed that before proceeding had been initiated, the employee had already been transferred to the Department of Railway (Safety) and that being so, he was under the control of Sr. Divisional Officer (Safety). Thus, it cannot be said that the proceedings were without jurisdiction.

11. Next Mr. Ojha submitted that the enquiry officer had not noted any fact to establish that the employee was on unauthorized

leave. With reference to the enquiry report, he submits that the enquiry officer had said that the employee, on his own showing, has admitted his unauthorized leave and, thus, the charge stands established. There is no finding based on evidence.

12. We have examined the report of the enquiry officer. There is no denial by the employee at any stage that he had gone on casual leave for 12 days and did not return to work till departmental proceedings were initiated. He had been granted casual leave only for 12 days, whereafter for almost a year, he remained absent without permission. If this be the fact, which the employee himself is not denying, we do not think that the enquiry officer was wrong in holding that the employee had accepted the unauthorized absence. The employee had given a justification for absence i.e. the civil unrest at Lumding at the instance of ULFA against employees from Bihar and his illness at Muzaffarpur. That is a reason, which may justify his absence, but that does not mean his unauthorized absence changes into an authorized absence. We are, thus, not impressed with this line of submissions. Reliance on a decision of the Apex Court in the case of **Krushnakant B. Parmar vrs. Union of India and others**, since reported in **(2012) 3 SCC 178** is not sustainable; inasmuch their Lordships clearly held that in a departmental proceeding the authority has to come to a finding on the basis of preponderance of evidences.



The enquiry officer has looked into the evidence. Railway had submitted that there were over 19,000 Railway employees at Lumding including substantial force from Bihar but none of them had abandoned place of work because of the civil unrest by ULFA extremists. The employee himself had not contradicted his absence. No permission had been granted for this absence. Then what is it if not unauthorized leave. Thus, we cannot accept this submission on behalf of the employee.

13. Now we may come to the issue of voluntary retirement. We have already quoted Rule 67 above, which deals with the voluntary retirement on completion of 20 years of qualifying service. Sub-rule (1) thereof stipulates that any employee, who has completed 20 years of qualifying service, may, by giving notice of not less than three months in writing, seek voluntary retirement. There is a proviso, which stipulates as to who are not entitled to do so. Then we have sub-rule (2), which says that the voluntary retirement application made under sub-rule (1) requires acceptance by the appointing authority, but there is a proviso, which specifically lays down that if there is no refusal before expiry of the period specified in the notice, which would ordinarily be of three months' period, then retirement shall become effective from the date of expiry of the notice period. A plain reading of this Rule makes it abundantly clear that there is no



restriction on the right of a Railway employee to make an application seeking voluntary retirement if he has completed 20 years of service. He has only to give three months' notice. Railway may refuse the same but that refusal has to come within the period of three months, failing which, on expiry of three months' notice period he would be deemed to have retired. There is no exception to this. Retirement is not subject to acceptance. To the contrary, it is only subject to specific order of refusal to accept. That makes the whole difference in the present case.

14. It is not disputed by the Railway, that at the relevant point of time any refusal order was passed much less communicated to the employee. The case of the Railway first was that the employee had not completed 20 years of service. They had sought to deduct certain period of leave, which employee had earlier availed and taking that deduction into account, the period of service was counted less than 20 years. They have failed to take into account that this leave period was subsequently regularized and sanctioned. That being so, the plea that the employee's service was less than 20 years, they themselves abandoned. Then stand was taken that there being a disciplinary proceeding pending when an application seeking voluntary retirement was made, voluntary retirement could not be acceded to, nor such a request could have been made. We have



noticed this only to reject it because there is no such condition in the Rules. To the contrary, provision of proviso to sub-rule (2) of Rule 67 is clear that unless refusal is communicated within the notice period, the employee would be deemed to have retired on the expiry of the notice period. The language of the Rule, which is statutory in nature, is clear and unambiguous. Courts cannot read and interpret condition of the Rules, which are not to be found in the plain language. Thus, we do not find that the Tribunal was in error in holding that in the facts of the case, on expiry of three months' period from the date of the application as made by the employee, the employee retired during the pendency of the disciplinary proceeding itself. The contention of the Railway to the contrary has rightly been rejected.

15. On behalf of the employee, it is then submitted that if the employee is deemed to have retired, then the disciplinary proceeding, initiated for his removal from service, would automatically lapse as the master-servant relationship would end by his superannuation. Such a proceeding could not be carried on and the Tribunal was right in holding that punishment order passed by the disciplinary authority was, thus, not sustainable. Punishment was removal from service. Mr. Ojha is correct in submitting that there cannot be removal of an employee, who had already retired.

16. We have considered the arguments. In this regard, we



may refer to Rule as quoted above. The relevant part is contained in Rule 9(2)(a). That Rule specifically provides that where a departmental proceeding has been initiated prior to superannuation of a Railway employee and if, in the meantime, he retires, the proceeding would be deemed to have continued and concluded in the same manner as if the employee was in service. Having considered the matter, to us, the Rule is simple. All it says is that once a departmental proceeding has been initiated, it would continue notwithstanding the employee in the meantime retired. But the matter does not end there because when an employee is in service, the departmental proceedings are initiated under the Service Rules and punishment relates to his service tenure i.e. withholding of increment, suspension, demotion, deduction of pay, reduction in rank or dismissal/removal from service and the like. But these are not relevant for a person, who, during the pendency of the departmental proceeding, superannuates. After superannuation, he cannot be demoted, nor suspended, nor his increments withheld, nor he can be dismissed from service because he ceases to be in service after superannuation. The change, that has to come in the departmental proceeding, is now that the proceeding would be under the relevant Pension Rules because the only punishment, that can be meted out to the delinquent employee, is with regard to pension, as pension is not only subject to satisfactory



service, but it is also subject to satisfactory future behaviour. Thus, in the departmental proceeding, if a retired employee is found guilty, his service would not be deemed to be satisfactory, giving right to the Railway to pass orders in relation to his retiral benefits.

17. Thus found and thus far, the Tribunal was correct. But we must observe that the manner, in which the Tribunal has, thereafter, dealt, was not proper. When the Tribunal was remanding the matter to the disciplinary authority, it ought not have done so by loading the order with their finding of deliberate, wilful unauthorized absence. It ought to have left it to the discretion of the disciplinary authority to decide. The effect would be of having given the said finding virtually, the Tribunal has written the judgment for the disciplinary authority. The disciplinary authority could, in no way, ignore those findings. It is because of this that we disprove the finding while the matter is being remanded.

18. To us the problem is simple. The order, that is to be passed by the authority, is in two parts. It is akin to an order of conviction followed by an order of sentence or a judgment followed by decree. The disciplinary authority first has to find the employee guilty of some misdemeanour i.e. the judgment part. Then based upon this finding, it has to impose a punishment commensurate to the delinquency i.e. the sentence or the decree part. In the present case,



what has gone wrong, is the latter part and not the first part because the first part remains the same where employee is in service or has superannuated. In both the cases, the disciplinary authority has first to give a judgment of delinquency. That would not change by reason of superannuation of an employee. It is only the sentence, the decree part, which is the latter part, that would change because in service period punishment related to his service tenure can be given, which may also in cases extend to retiral benefits, but upon superannuation, no such order can be passed. The order can be only in relation to the retiral benefits. It is this latter part that is to be worked out again.

19. As we have noticed, the disciplinary authority has passed the extreme punishment of removal from service, that may be given to an employee,. This automatically entails upon forfeiture of all pensionary benefits if this is the quantum of punishment, that was contemplated by the disciplinary authority. If it is translated to a punishment in the retiral period, it would mean virtually forfeiting all pensionary benefits. In our view, having considered the matter from all aspects in the facts and circumstances, that would be too severe a punishment and would be shocking to conscience of the Court. We have already noticed that the employee had unblemished service career of almost 30 years. He then had a threat perception because of civil unrest in the area by ULFA militants, who were singling out



persons from Bihar for abduction and killing. In this threat perception, he did not return from leave. He was absent for about 8 months when disciplinary proceedings were initiated. For this absence, forfeiture of entire benefits, which the employee earned by serving for about 30 years with full devotion, would be wholly disproportionate. More so when there is no change of any moral turpitude. It would not remain punishment, but could be termed as victimization. Still many years to go but the employee took voluntary retirement in the year 2007 during the pendency of the proceeding. Therefore, we must hold that the extreme punishment was not warranted and would be shockingly disproportionate.

20. Considering the fact that the employee retired almost 10 years back and naturally must be a senior citizen, asking him to face the departmental proceeding, while staying in Muzaffarpur, at Lumding in Assam would itself be a big punishment. We, therefore, do not intend to sustain the order of remand as made by the Tribunal. The finding of unauthorized leave cannot be impeached and that being so considering the service career and the justification for this unauthorized leave, in the special facts and circumstances, we would deem that forfeiture of his pensionary benefits to the extent of 20% would meet the ends of justice. Therefore, in the facts and circumstances aforesaid, while holding that the Tribunal was correct

in arriving at the finding that the employee had retired and that the disciplinary proceeding could not pass an order of removal from service thereafter, we modify the order of the Tribunal, setting aside that part dealing with remand and in place order for forfeiture of retiral benefits by 20%.

21. These two writ petitions, with the aforesaid modification, are, accordingly, disposed of. It is expected that as the employee has already retired in the year 2007 and is residing at Muzaffarpur in the State of Bihar, the authorities of Railway would, without any further delay or harassment to the employee, settle his retiral dues, accordingly, within a period of two months from today.

(Navaniti Prasad Singh, J)

AFR

MPS/-

(Jitendra Mohan Sharma, J)

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